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In the

Supreme Court of the United States

October Term, 1905

No. 274

Filed October 1905

Lem Woo, Plaintiff (Appellant) v. Thomas Williams, Chief of Commissary; Wong Sing, [illegible]; Mah Ma Sing, Sub-Wan, Sub-Wan, Commissioners, Etc., also Tom, Deputy U. Immigrant, Appellees.

Brief & Argument of Appellant.

Appeal from the Court of Appeals for the District of Columbia.

Brief and Argument of Appellant.

HAMPTON L. CARSON,
WILLIAM W. [illegible],
Counsel for Appellant.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 275.

LONE WOLF, Principal Chief of the Kiowa Indians *et al.*, *Appellants*,

v.

ETHAN A. HITCHCOCK, Secretary of the Interior *et al.*

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF AND ARGUMENT OF APPELLANTS.

STATEMENT OF FACTS.

On the 6th of June, 1901, Appellant, Lone Wolf, filed in the Supreme Court of the District of Columbia his Bill of Complaint against the Respondents in this case. (Record, pp. 1 to 15.)

The Bill was amended by leave of Court by the addition of the Appellants as parties complainant as prayed. (Record, p. 25.)

The Bill, as thus amended, presents the facts in this

case fully and in detail, to which the attention of this Court is respectfully requested. A brief summary of the facts is as follows:

a. Appellants are members of the confederated tribes of Kiowa, Comanche, and Apache Indians, and reside on their reservation in the southwestern part of the Territory of Oklahoma. They preserve their tribal organizations for business purposes pertaining to their tribes, but have no existence as a body politic; hence they sue as well for themselves as for all other members of the said tribes. A general council of said tribes was held in said Territory in June, 1901, which authorized appellants to resort to all legal means necessary to prevent the opening of their lands to settlement by white people, and this authority was given in the only manner known to said tribes. (Record, pp. 20–21.)

b. Prior to the year 1868, the said tribes were in possession of large tracts of country in the State of Kansas and elsewhere, and the United States Government, desiring to purchase said lands by exchanging other lands therefor, a treaty was concluded at a council on Medicine Lodge Creek, in Kansas, in 1867, which was proclaimed August 25, 1868. By this treaty about three million acres of land on which Appellants now reside, situated in Oklahoma Territory, were set apart for the absolute and undisturbed use and occupation of said tribes, and by the terms of the treaty no persons, except those therein specially authorized to do so, were ever to be permitted to pass over, settle upon, or reside in the said reservation. The Indians, in consideration of the advantages and benefits conferred by said treaty and the many pledges of friendship by the United States, stipulated that they would relinquish all right to occupy the territory outside said reservation; that they would withdraw all opposition

to the construction of certain railroads mentioned in said treaty, and would refrain from all acts of hostility to white persons, or to their property, and would withdraw all opposition to the establishment of military posts in the Western Territories.

c. The 12th article of said treaty was to the effect that no treaty for the cession of any portion or part of the said reservation, which was to be held in common, should be of any validity or force as against the said Indians, "*unless executed and signed by at least three-fourths of all the adult male Indians occupying the same.*"

d. After the promulgation of the treaty, the Indians removed to and settled upon said reservation and they have since resided thereon; they have kept, on their part, all the promises and agreements contained in said treaty, and they have never agreed or consented to relinquish their right to occupy said lands or signed any treaty for that purpose as provided in said article twelve. In the year 1892 a commission of three persons, claiming to represent the United States, came to said reservation and sent for and brought before them certain members of said tribes to whom false and fraudulent representations were made, whereby 456 members of said tribes were induced to sign a paper, which they were informed was a treaty or agreement with the United States in reference to their lands, which is now known as the Jerome treaty. The interpreters were employed by the said commission, but instead of faithfully and truly translating said treaty they falsely and fraudulently misrepresented its provisions, so that as signed it did not express the wishes of the tribes. One of the interpreters and the wife of the other were adopted into the tribes, and made equal in the distribution of the lands and moneys of the tribe; the Indian agent falsely represented to the Interior Department that

three-fourths of the adult male members of the tribe had signed said treaty, whereas by a census of the Indians taken about that time for the purpose of making a *per capita* payment to said Indians, it appeared that twenty-three less than three-fourths thereof had signed the same. These facts were reported to Congress by the Secretary of the Interior, Mr. Hitchcock (Senate Doc. 76, first session, 56th Congress), who expressly stated in his report that the 12th article of the Medicine Lodge treaty "precludes a less number than three-fourths of the adult male members of the tribes from ceding their lands."

e. Soon after the signing of the Jerome treaty, some of said Indians learned that the provisions of the treaty had not been correctly and truly translated to them, and they at once proceeded to make known to the members of said Commission that they had been deceived and that they desired to withdraw their names; instead of being permitted to do so, they were threatened with violence if they persisted in their opposition to said treaty. The Indian tribes sent delegates to Washington at each session of Congress since 1892, when said treaty was signed, to protest against the ratification of said treaty, except to the last Congress, and they would have sent delegates to that Congress had they not been informed by the Indian agent that the opposition of the Interior Department and their own prior protests would cause Congress to ignore the same, and that hence there was no necessity to incur the expense of sending a further delegation.

f. On the 9th of October, 1899, there was a general council of tribes held at Mount Scott on their reservation, at which 571 adult male members of said tribes were present; the Jerome treaty was fully discussed and all of the Indians present, which was nearly the full adult male membership of said tribes, signed a memorial repudiating

said treaty, and asking Congress to "cast it out and not accept it as their free act and deed." This memorial was approved by the Indian agent as representing their sentiments and wishes, and was forwarded to Washington; the Secretary of the Interior, Mr. Hitchcock, transmitted the memorial to Congress, together with a letter from the Commissioner of Indian Affairs, Mr. Jones, in which letters said memorial was fully approved and the rejection of said treaty recommended.

g. But few of the Indians can either speak or understand the English language, and in the making and signing of said treaty they relied implicitly upon the good faith of said commission and their interpreters, and when signed, they believed said treaty fully and faithfully represented their wishes.

h. The price to be paid for said two million acres of said surplus lands was fixed by Congress at one dollar an acre, or two million dollars, whereas the interpreters represented to them that when sold, at some time in the future, the treaty provided that they should receive $2.50 per acre therefor.

i. Congress, when assuming to ratify said treaty, changed its provisions in several important particulars, as is fully pointed out in said Bill of Complaint (Record, pp. 9 to 11), and in the ratifying act provided as follows: "Said agreement be, and the same hereby is, accepted, ratified, and confirmed, *as herein amended*." The Act ratifying said treaty contained other provisions, not inserted therein, but made applicable thereto, which put in force, in said reservation, the mining laws of the United States, and other provisions conferring jurisdiction upon the Court of Claims to adjudicate certain questions affecting the title to their said lands, and providing for laying out counties, towns, and opening their said lands,

to the extent of about two million acres, to settlement by white people.

j. So much of said Act of Congress of June 6, 1900, which assumed to ratify said treaty, and so much of other acts of Congress as provide for the allotment of certain of their lands, the surveying, laying out, and plotting of town-sites and locating county-seats on said lands, and the ceding to the United States and opening to settlement by white people of two million acres of said lands, were enacted in violation of the property rights of said Indians, and, if carried into effect, will deprive said Indians of their lands without due process of law. These acts and parts of acts are contrary to the Constitution of the United States and are void and confer no right, power or duties upon the Respondents in this case, to do or perform any of the things enjoined or required by said unauthorized acts of Congress for the following reasons:

"*First.* That the said Indians were induced to sign the said treaty by false and fraudulent translations, and that none of those who signed said treaty understood its provisions.

"*Second.* That by the provisions of the Medicine Lodge treaty no part or portion of said lands could be ceded or alienated without the consent of three-fourths of the adult male members of said tribes, and that three-fourths of such male adults have never signed said Jerome treaty or any other treaty or agreement by which they ceded or alienated any portion of their said lands.

"*Third.* That eight months prior to the time Congress assumed to ratify said Jerome treaty 571 adult male members of said tribes, which were more than three-fourths of such number, met in general council, with the approval of the Secretary of the Interior and the Indian agent at Mount Scott, in said reservation, and solemnly repudiated the said treaty and prayed Congress 'to cast it out and not accept it as their free act and deed.'

"*Fourth*. That in the act of Congress assuming to ratify said Jerome treaty numerous amendments, changing important provisions of said treaty, were made by Congress, and that said treaty was attempted to be put in force without submitting said amendments or the treaty as thus amended to the approval of said Indians." (Record, p. 13.)

k. Notwithstanding said acts of Congress are unconstitutional and void and impose no duties or authority whatever upon the Respondents to enforce the same, yet they are now engaged in carrying said void acts into effect, and are thereby threatening said Indians with loss of their property and lands, in violation of the Constitution of the United States and the solemn treaty provisions by which they acquired said lands. Unless restrained by this Honorable Court the Respondents will cause irreparable injury, wrong, oppression and loss of the property rights of said Indians.

l. The Respondents were required to answer under oath the allegations of the Bill; and a writ of injunction was prayed for, commanding said Respondents their agents, and employés, and all officers of the United States acting under their authority, to desist absolutely and refrain from proceeding farther against Complainants and said Indians in the carrying into effect of said void acts of Congress. It was averred that said Indians are wholly without remedy at law, and that the relief prayed for must be granted at once, otherwise they will sustain irreparable injury and loss of property of immense value; a temporary injunction, pending litigation, was therefore prayed, and such other and farther relief as the nature of the case might require, and that upon a final hearing the said injunction might be made perpetual.

On the 21st of June, 1901, the application for a temporary injunction, as prayed for in the Bill, came on for

hearing, and the same was by the Court denied. (Record, p. 25.) And, thereupon, *eo die*, Respondents filed in Court their demurrer to said Bill and to the amendment thereto. (Record, p. 34.)

On the 26th of June thereafter, by agreement of parties in open Court this cause was submitted to the Court upon the said demurrer, and the Court sustained the same; and Complainants electing to stand on their said bill and the amendments thereto, it was considered, ordered, and decreed by the Court that said bill be dismissed. Whereupon the Complainants took an appeal to the Court of Appeals of the District of Columbia, and this fact was noted in the decree. (Record, p. 35.) The opinion of the Court below on refusing the application for a preliminary injunction is printed in the Record, pp. 26 to 34.

On the 4th of December, 1901, the case was submitted to the Court of Appeals of the District of Columbia on the printed record and briefs, and on the 4th of March, 1902, the Court of Appeals entered an order to the effect that the decree of the Supreme Court of the District of Columbia be affirmed. The opinion of the court by Chief Justice Alvey is printed in the Record, pages 37 to 44.

On the 6th of March, 1902, counsel for appellants submitted a motion for a rehearing, which motion is printed in the Record, pages 45–46. On the 14th of March, 1902, the motion for a rehearing was overruled. The opinion of the court in overruling the motion is printed in the Record, pages 46–47.

On the same day an appeal was allowed to the Supreme Court of the United States (Record, page 48).

A Fundamental Error.

First. The fundamental error of the Court of Appeals of the District of Columbia is found in the following extract from the opinion of the Court (Record, page 43):

"The Indians within the United States or their jurisdiction have, from the earliest period of the Government, been regarded and treated as the mere wards of the Government, and the lands and reservations occupied by them have been assigned to them by the United States as places of domicile for the tribes, and they hold and occupy such lands with the assent of the United States and under their authority. Such lands and reservations are held by the Indians subject to the control and dominion of the United States, and such Indian tribes are subject to be changed from one locality or reservation to another, as may best serve the purposes and policy of the Government in the administration of Indian affairs. They have no title in the lands they occupy, except in certain cases where treaties of settlement may have conferred a title in the land; their right is simply to occupy at the will of the Government and under its protection."

Second. This is an historical error and ignores the feature of Indian consent. In no instance has the United States regarded the Indian right of occupancy of land as simply a right to occupy at the mere will of the Government. Especially is this true in all cases where the right of occupancy was secured by treaty or agreement between the Indians and the United States. All treaties and amendments by the Senate, or agreements, ratified by Congress since 1873, which affected the Indian right of occupancy of land, *have been submitted to the Indians for their approval or rejection.* No land, occu-

pied by Indians under treaties or agreements, has ever been taken away from them by the Government, *except with their consent*, given in a written treaty or agreement, until the taking, in the case at bar, of the lands of the Consolidated Tribe of the Kiowa, Comanche and Apache Indians by the Act of Congress of June 6, 1900.

Third. The Honorable William A. Jones, the present Commissioner of Indian Affairs and one of the Respondents in the case at bar (in an official letter to the Secretary of the Interior, dated January 5, 1900, in which he advised against the then pending Act of Congress to ratify the so-called Jerome Treaty, which embraced the lands in question in the case at bar), said:

"This title is misleading, inasmuch as it is not an Act to ratify and confirm an agreement, but to amend an agreement, without the consent of one of the contracting parties thereto.

"It is certainly a novel proposition in law that one party to an agreement may, without the consent of the other, alter or modify an essential part of such contract. *It is apparent that no court of law would uphold or enforce any contract so altered or amended.*

"In all dealings with the Indian tribes I do not find that any agreement has ever been 'amended' by the Congress without providing for the assent of the Indians interested. In one or possibly two cases Congress has entirely ignored an agreement for the cession of lands upon the ground that the Indians, parties thereto, were not the owners of the lands ceded, but it has never attempted to write in new and different words in a signed agreement, without providing that the amendment should be open to rejection or adoption by the Indians interested.

"A number of cases are found in the statutes where agreements have been so amended, but in every case provision has been made for re-submitting the agreement as amended for the consideration of the Indians. I mention three such cases:

"In ratifying the agreement made by Commissioners John V. Wright, Jared W. Daniels, and Charles F. Larrabee, on behalf of the United States, with the Indians of the Fort Berthold Agency, Congress amended article 6 of said agreement, and provided that—

"'This act shall take effect only upon the acceptance of the modification and changes made by the United States as to article 6 of the said agreement by the said tribe of Indians, in manner and form as said agreement was assented to, which said acceptance and consent shall be made known by proclamation by the President of the United States upon satisfactory proof presented to him that said acceptance and consent have been obtained in such manner and form.' (26 Stats. 1035.)

"The agreement between the Commissioners on behalf of the United States and the Cherokee Nation, concluded December 19, 1891, which provided for the cession by the said nation to the United States of all the lands known as the 'Cherokee Outlet,' was ratified with amendments. (27 Stats. 641).

"To provide against the possible contention that the amended agreement was not the contract consented to by the Cherokee Nation, Congress provided—

"'That the acceptance by the Cherokee Nation of Indians of any of the money appropriated as herein set forth shall be considered and taken, and shall operate as a ratification by said Cherokee Nation of Indians of said agreement as it is hereby proposed to be amended, and as a full and complete relinquishment and extinguishment of all their title, claim, and interest in and to said lands.'

"As a matter of fact the amendments proposed by Congress in the act of March 3, 1893, were formally concurred in by the Cherokee Nation on April 3, 1893.

"The agreement with the Shoshone and Arapaho tribes of Indians in Wyoming was ratified by section 12 of the act of June 7, 1897 (30 Stats., 93), which section commences as follows:

"'That the following amended agreement with the Shoshone and Arapahoe tribes of Indians in the State of Wyoming is hereby accepted, ratified, and confirmed, and

shall be binding upon said Indians when they shall in the usual manner agree to the amendment herein made thereto.'

"A further examination of the statutes shows that prior to 1873, when the relations of the Government and the Indian tribes were under treaties, all amendments made by the Senate to treaties presented by the Executive for its consideration were submitted to the Indians for their concurrence before they were deemed to be in effect, *and it does not appear anywhere in the statutes, so far as this office has been able to ascertain, that this Government has assumed the authority to change or amend a treaty or agreement with an Indian tribe, and to put the amended or changed agreement or treaty into effect without the consent of the tribe interested.*" (House Ex. Doc. No. 333, 1st Session, 56th Congress, pp. 4 and 5.)

Fourth. It thus appears that there is no instance on record where the Government has ever deprived the Indians of the occupancy of land held by treaty or agreement with the United States, except in pursuance of another written treaty or agreement, and even amendments to such treaties, or agreements proposed by the Senate or Congress, have been submitted to the Indians for their approval, before taking effect.

Fifth. The letter containing the foregoing statement of Commissioner Jones was transmitted to Congress January 22, 1900, by the Secretary of the Interior, one of the Respondents in this case, in a letter giving his opinion that the Jerome agreement should not be ratified, and stating that there are other reasons for its rejection, equally as potent, pointed out by the Commissioner of Indian Affairs in the foregoing letter, "which deserve serious consideration." Commissioner Jones is corroborated by the legislative history of the United States, of which this court will take judicial knowledge. At the last session of Congress (first session of 57th) at

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least three agreements with Indian tribes were ratified by Congress with amendments, and the amended agreements were submitted to the Indians for ratification or rejection. On the 1st of March, 1901, Congress ratified an agreement with the Cherokee tribe of Indians with amendments, and the amended agreement was submitted to the Cherokee voters for ratification or rejection. It was rejected by the Indians by a popular vote, and at the next session of Congress another amended agreement with said Indians was ratified by Congress, was submitted to the Indians and ratified by them at a popular election held August 7, 1902. Attention is called to a volume of Indian Treaties published by the United States of the size and style of binding of the Revised Statutes, containing 1,053 pages. In this volume will be found a "Compilation of all the treaties between the United States and the Indian Tribes now (1873) in Force." It does not contain those treaties which have become obsolete or which have been superseded by other treaties. The oldest treaty which is published in this volume (pages 25 to 28) was concluded with the Cherokees, November 22, 1785, during the Government under the Articles of Confederation. The boundaries of the Cherokee lands were fixed in this treaty; and *from that day to this the United States has never taken or occupied any lands, the occupancy of which was granted to said Indians, without first having obtained their consent in a written treaty or agreement.* And so it has been with the other Indian tribes in this country, as will appear by the numerous treaties published in said volume. Before the Revolutionary War the Indian occupancy was always respected by the British Government, and the Colonial Governments, and the original right of occupancy was never surrendered, except by treaties with the Indians.

Sixth. In support of this proposition the following authorities are cited:

Under the title of "Indians," the American and English Encyclopedia of Law, Second Edition, page 229, contains the following language taken from the text:

"Indian Lands. Nature of Indian Title. Following the policy adopted by the European nations in respect to their American possessions, the Colonial Governments recognized in the Indian tribes a possessory right to the land occupied by them, but asserted in themselves the ultimate title to the soil. Since the Revolution the original States as to lands within their respective jurisdictions, and the United States as to all other lands, have adopted the same policy. The Indians have a right to the use and occupancy of the land, subject to the dominion and control of the State or the United States, but they are not permitted to sell or transfer their right to the land without the consent of the dominant powers, while on the other hand this right can be extinguished only by the voluntary consent of the Indians."

A note to this proposition in the text is supported by the citation of thirteen cases decided by the Supreme Court of the United States, and by opinions in twelve States, in the Territory of Oklahoma and in the Dominion of Canada. (See 16 Am. and Eng. Encyc. of Law, Second Edition, page 230.) And further, in the text of the same volume, under the title, "Extinguishment of Indian Title," this language is used:

"As has already been stated, the Indian title to land can be extinguished only by the consent of the Indians, and by its surrender by them to the United States. Numerous treaties have been entered into between the United States and the various Indian tribes, by which the Indians have ceded their right to the lands occupied by them to the United States, in exchange for money and

ther lands, the land so ceded being then opened for set-lement. So also the original States, both before and after he adoption of the Federal Constitution, assumed the ight of entering into treaties with the Indian tribes for he extinguishment and acquisition of their title to lands within their respective jurisdictions."

A note to this text cites in its support numerous Fed-eral and State authorities (*Id.* page 232).

Seventh. The case of Strong *v.* Waterman, 11 Paige (N. Y.) Chancery Reports, 607, was cited among others, and it is a conclusive authority on this point. The opin-ion was by Chancellor Walworth, whom Mr. Justice Story pronounced, in his lifetime, "the greatest Equity Jurist living." The distinguished Chancellor, delivering the opinion of the court in that case, said:

"The right of the Indians in this State to the use, pos-session, and occupancy of the lands of their respective reservations, which have not been by them voluntarily ceded to the people of the State, or granted to individuals with the assent of the State, does not, at this time, admit of doubt. The ultimate fee of the land is undoubtedly in the State, or its grantees; but the right of the Indians to the beneficial use and occupancy thereof, until they think proper voluntarily to relinquish and abandon that right, has been too long recognized in this State to be now called in question."

Eighth. If it were true, as a matter of legislative and administrative history, as was stated by Chief Justice Alvey, in the opinion of the Court of Appeals, that the Indians in this country have, from the earliest period of the Government, occupied public lands at the will of the Government, and that the Indian tribes were subject to be changed from one locality or reservation to another without their consent, as may best serve the purposes and

policy of the Government in the administration of Indian affairs, we would readily admit that the Courts would be bound to recognize the right of the Government to continue that policy. But the facts being otherwise, we contend that the converse of the proposition is equally true.

Ninth. If the Government, as stated by Commissioner Jones, and as established by the decisions of our Courts, both Federal and State, has universally recognized the Indian right of occupancy as sacred, and that such occupancy could not be taken from the Indians except with their voluntary consent, expressed in a written treaty or agreement, this Court must hold that this legislative and administrative precedent is the law of the land, and is binding upon Congress and all the Departments of the Government of the United States.

RIGHT OF INDIAN OCCUPANCY IS AS SACRED AS A FEE-SIMPLE TITLE.

Tenth. Indians occupying lands in this country, under the provisions of treaties or agreements with the United States, cannot be deprived of the use and occupancy of such lands without their consent, except by due process of law; and such lands cannot be taken from them, except in compliance with the provisions under which such lands were acquired. The right of the Indians as to their occupancy is as sacred as that of the United States to the fee.

United States *v.* Cook, 19 Wall. 292–591.
Holden *v.* Joy, 17 Wall. 247.
Wilson *v.* Wall, 6 Wall. 89.
Chinese Exclusion Cases, 130 U. S. 581–611.
Leavenworth, &c., Railroad Co. *v.* United States, 92 U. S. 733.

16 Am. and Eng. Encyc. of Law, second edition, 229 to 233.

Society for Propagation of Gospel *v.* New Haven, 8 Wheat. 484, 493.

Mitchel *v.* United States, 9 Peters, 745–755.

Worcester *v.* The State of Georgia, 6 Peters, 581.

Beecher *v.* Wetherby, 95 U. S. 525–526.

Eleventh. In the case of the United States *v.* Cook, *supra*, this Court stated the law as to the Indian title of occupancy as follows:

"The right of the Indians in the land from which the logs were taken was that of occupancy alone. They had no power of alienation except to the United States. The fee was in the United States, subject only to this right of occupancy. This is the title by which other Indians hold their lands. It was so decided by this Court as early as 1823, in Johnson *v.* McIntosh, 8 Wheaton, 574. The authority of that case has never been doubted. 1 Kent, 257; Worcester *v.* Georgia, 6 Peters, 580. *The right of the Indians as to their occupancy is as sacred as that of the United States to the fee*, but it is only a right of occupancy. Cherokee Nation *v.* Georgia, 5 Peters, 48. The possession, when abandoned by the Indians, attaches itself to the fee without further grant.

"This right of use and occupancy by the Indians is unlimited. They may exercise it within their discretion. If the lands in a state of nature are not in a condition for profitable use, they may be made so. If desired for the purposes of agriculture, they may be cleared of their timber to such an extent as may be reasonable under the circumstances."

Twelfth. In the case of Holden *v.* Joy, *supra*, this Court distinctly held that Congress has no power to interfere with rights under treaties, except in cases purely political. That part of the opinion in that case to which attention is especially called is as follows:

"Suppose that is so, still it is insisted that the President and Senate, in concluding such a treaty, could not lawfully covenant that a patent should issue to convey lands which belonged to the United States without the consent of Congress, which cannot be admitted. United States *v.* Brooks, 10 Howard, 442. Meigs *v.* McClung, 9 Cranch, 11. On the contrary there are many authorities where it is held that a treaty may convey to a grantee a good title to such lands without an act of Congress conferring it, and that Congress has no constitutional power to settle or interfere with rights under treaties, *except in cases purely political.*" Wilson *v.* Wall, 9 Wallace, 89; Insurance Co. *v.* Canter, 1 Peters, 542; Doe *v.* Wilson, 23 Howard, 461; Mitchel *et al. v.* The United States, 9 Peters, 749; United States *v.* Brooks, *et al.*, 10 Howard, 460; The Kansas Indians, 5 Wallace, 737; 2 Story on the Constitution, 1508; Foster *et al. v.* Neilson, 2 Peters, 254; Crews *et al. v.* Burcham, 1 Black. 356; Worcester *v.* Georgia, 6 Peters, 562; Blair *v.* Pathkiller, 2 Yerger, 407; Harris *v.* Barnett, 4 Blackford, 369.

Thirteenth. In the case of Wilson *v.* Wall, *supra*, cited in Holden *v.* Joy, the language of the court is as follows:

"Now, while it is freely conceded that this construction given to the treaty should form a rule for the subsequent conduct of the department, it cannot affect titles given before by the Government, nor does it pretend to do so. Congress has no constitutional power to settle the rights under treaties except in cases purely political. *The construction of them is the peculiar province of the judiciary, when a case shall arise between individuals.* The legislature may prescribe to the executive how any mere administrative act shall be performed, and such was the only aim and purpose of this act."

Fourteenth. In the Chinese Exclusion Cases (130 U. S. 581–611), Mr. Justice Field, announcing the opinion of this Court, said:

"The rights and interests created by a treaty, which have become so vested that its expiration or abrogation will not destroy or impair them, are such as are connected with and lie in property, capable of sale and transfer or other disposition, not such as are personal and untransferable in their character."

And on page 610, this Court used this language:

"The passage cited by counsel from the language of Mr. Justice Washington in Society for the Propagation of the Gospel *v.* New Haven, 8 Wheat. 464, 493, also illustrates this doctrine. There the learned justice observes that 'if real estate be purchased or secured under a treaty, it would be most mischievous to admit that the extinguishment of the treaty extinguished the right to such estate. In truth, it no more affects such rights than the repeal of a municipal law affects rights acquired under it.' *Of this doctrine there can be no question in this Court.*" (8 Wheat. 493.)

Fifteenth. In the case of the Leavenworth, &c., Railroad Company *v.* United States, 92 U. S. 733, *supra*, this Court held as follows:

"Where the right of an Indian tribe to the possession and use of certain lands, *as long as it may choose to occupy the same*, is assured by treaty, a grant of them, absolutely or *cum onere*, by Congress, to aid in building a railroad, violates an express stipulation; and a grant in general terms of 'land' cannot be construed to embrace them."

And on page 755 of 92 U. S. this Court expressly affirms the doctrine laid down in United States *v.* Cook, 19 Wallace, 593, that the Indian right of occupancy was as sacred as that of the United States to the fee. That part of the opinion is as follows:

"And in the recent case of the United States *v.* Cook, where replevin was brought for timber cut and sold by Indians on lands reserved to them, the Court said that the fee of the lands was in the United States, subject only to a right of occupancy in the Indians; that this right of occupancy was as sacred as that of the United States to the fee; but it was 'only a right of occupancy' and 'that the possession when abandoned by the Indians, attaches itself to the fee without further grant.'" 19 Wall. 593.

Sixteenth. In the case of Society for Propagation of the Gospel *v.* New Haven, 8 Wheaton, 493, quoted with approval in the opinion of this Court in the Chinese Exclusion Cases (130 U. S. 581–611), *supra*, the doctrine upon this point was stated by Mr. Justice Washington as follows:

"But there is a still more decisive answer to this objection, which is, that the determination of a treaty cannot divest rights of property already vested under it.

"If real estate be purchased or secured under a treaty, it would be most mischievous to admit that the extinguishment of the treaty extinguished the right to such estate. In truth, it no more affects such rights, than the repeal of a municipal law affects rights acquired under it. If, for example, a statute of descents be repealed, it has never been supposed that rights of property, already vested during its existence, were gone by such repeal. Such a construction would overturn the best established doctrines of law, and sap the very foundation on which property rests."

Seventeenth. In the case of Mitchel *v.* United States (9 Peters, 745), *supra*, this Court gave an exhaustive consideration of the nature and extent of the Indian title to lands in Florida. The following extracts from the opinion of the Court in that case fully support the contention of counsel for Appellants in the case at bar:

"As Florida was for twenty years under the dominion of Great Britain, the laws of that country were in force as the rule by which lands were bought and sold; it will be necessary to examine what they were as applicable to the British Provinces before the acquisition of the Floridas by the treaty of peace in 1763. One uniform rule seems to have prevailed from their first settlement, as appears by their laws: that friendly Indians were protected in the settlement of the lands they occupied, and were considered as owning them by a perpetual right of possession in the tribe or nation inhabiting them, as their common property, from generation to generation, not as the right of individuals located on particular spots.

"Subject to this right of possession, the ultimate fee was in the crown and its grantees, which could be granted by the crown or colonial legislatures while the lands remained in the possession of the Indians, though possession could not be taken without their consent. * * * See cases collected in 2 Johnson's Dig. 15, tit. Indians; and Wharton's Dig. tit. Land, &c., 488. Such, too, was the view taken by this Court, of Indian rights in the case of Johnson *v* McIntosh, 8 Wheaton, 571, 604, which has received universal assent.

"The merits of this case do not make it necessary to enquire whether the Indians within the United States had any other rights of soil or jurisdiction; it is enough to consider it as a settled principle that *their right of occupancy is considered as sacred as the fee simple of the whites.*" (5 Peters, 48.)

Eighteenth. In the case of Worcester *v.* The State of Georgia (6 Peters, 582), this Court in its opinion discussed the whole question of Indian rights and Indian treaties. Mr. Justice McLean, concurring in the opinion of the Court in that case, said:

"The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended mean-

ing than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. * * * How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction. * * * We have made treaties with them; and are those treaties to be disregarded on our part, because they were entered into with an uncivilized people? Does this lessen the obligation of such treaties? By entering into them, have we not admitted the power of this people to bind themselves and to impose obligations on us. * * *

"Nations differ from each other in condition, and that of the same nation may change by the revolution of time, but the principles of justice are the same. They rest upon a base which will remain beyond the endurance of time.

"After a lapse of more than forty years since treaties have been solemnly ratified by the general Government, it is too late to deny their binding force. Have the numerous treaties which have been formed with them, and the ratification by the President and Senate, been nothing more than idle pageantry?

"By numerous treaties with the Indian tribes we have acquired accessions of territory, of incalculable value to the Union. Except by compact we have not even claimed a right of way through the Indian lands."

Nineteenth. In the same case (Worcester *v.* Georgia, *supra*, pages 559–560), Chief Justice Marshall, delivering the opinion of the Court, referred to the course pursued in reference to Indian tribes on this continent, and said:

"The Indian nations had always been considered as distinct, independent political communities retaining their original natural rights, *as the undisputed possessor of the soil from time immemorial*, with the single exception of that imposed by irresistible power, which excluded them from

intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed, and this was a restriction which those European potentates imposed on themselves, as well as on the Indians."

Twentieth. And referring to the policy which the State of Georgia had pursued, Chief Justice Marshall said (page 560):

"Georgia, herself, has furnished conclusive evidence that her former opinions on this subject concurred with those entertained by her sister States and by the Government of the United States. Various acts of her Legislature have been cited in the argument, including the contract of cession made in the year 1802, all tending to prove her acquiescence in the universal conviction that the Indian nations possessed a full right to the lands they occupied, until that right should be extinguished by the United States, *with their consent.*"

Twenty-first. In the case of Beecher *v.* Wetherby, 95 U. S. 525-526, *supra*, this Court again affirmed the doctrine laid down in United States *v.* Cook, *supra*, as follows:

"In United States *v.* Cook, the United States maintained replevin for timber cut and sold by Indians on land reserved to them, the Court observing that the fee was in the United States, and only a right of occupancy in the Indians; that this was the title by which other Indians held their lands, and that the authority of Johnson *v.* McIntosh on this point had never been doubted. But, added the Court, 'the right of the Indians to their occupancy is as sacred as that of the United States to the fee, but it is only a right of occupancy. The possession when abandoned by the Indians attaches itself to the fee without further grant.'"

THE MEDICINE LODGE TREATY A CONTRACT.

Twenty-Second. An agreement duly executed and confirmed, by which the United States cedes lands, or grants the right to the perpetual use and occupancy of lands, to Indians, in consideration of the relinquishment of the right to use and occupy other lands, is a contract which is binding upon both parties, and which cannot be abrogated or annulled without the consent of both parties.

Appellants rest their case upon this plain, elementary and indisputable legal proposition. They refer the Court to the provisions of the Medicine Lodge Treaty of 1868 (see 15 U. S. Stats., pp. 581–587), a synopsis of which is printed in the record of this case, pages 2, 3 and 4. Counsel for appellees did not cite, in the Court below, an authority or an Act of Congress by which lands thus acquired have been taken from the Indians without their consent, or without condemnation proceedings for rights of way, except the Act of June 6, 1900, the Act in question in this suit, which purported to ratify an agreement, which Congress itself made, but which was never agreed to by the Indians. It is conceded by counsel for appellees that Congress amended the alleged Jerome agreement, and that neither the amendments nor the agreement thus amended were submitted to the Indians for their approval. In the case of Campania Bilbaina *v.* Spanish-American Light and Power Company (146 U. S., p. 497), this Court, in an opinion by Mr. Justice Blatchford, all the other Judges concurring, held as follows: "But if there is any part of it (the contract), in regard to which the minds of the parties have not met, the entire instrument is a nullity as to all its clauses;" citing Eliason *v.* Henshaw, 4 Wheaton, 225; Insurance Company *v.* Young's

Administrator, 23 Wall. 85; Tilley *v.* County of Cook, 103 U. S. 155; Minneapolis and St. Louis Railway *v.* Columbus Rolling Mill, 119 U. S. 149, 151. See also Fire Insurance Ass'n *v.* Mickham, 141 U. S. 564; Crabtree *v.* St. Paul Opera House Co., 39 Fed. Rep. 746; Sibley *v.* Felton, 156 Mass. 273, 276–277; White *v.* Hitchcock, 74 Mich. 208; Kleinhans *v.* Jones, 37 U. S. App. 185; National Bank *v.* Hall, 101 U. S. 50; Eggleston *v.* Wagner, 46 Mich. 620.

In the case of Sibley *v.* Felton, *supra*, the Supreme Judicial Court of Massachusetts held that "failure to agree upon the details or upon a complete plan would render all the preliminary agreements void." The opinion was by Mr. Justice Morton, and all the Judges concurred. Citing Lyman *v.* Robinson, 14 Allen, 242, 252; May *v.* Ward, 134 Mass. 127; Ashcroft *v.* Butterworth, 136 Mass. 511; Freeland *v.* Ritz, 154 Mass. 257; Appleby *v.* Johnson, L. R. 9 C. P. 158; Ridgeway *v.* Wharton, 6 H. L. Cas. 238.

THE MINDS OF CONTRACTING PARTIES MUST AGREE UPON ALL PARTS OF THE CONTRACT.

Twenty-third. Counsel for appellees state in their brief in the court below (page 55) that the Indians ought not to object to the changes which Congress made in the agreement, without consulting them, for the reason that the changes were for the benefit of the Indians, and, "instead of working an injury, were calculated to inure to their advantage and serve to illustrate the purpose and care of Congress to fully protect them."

Counsel for appellants will not enter into a controversy on this subject, although the appellants do not concede this fact, for the reason that it does not matter what may

have been the character of the changes which were made. The law is, that if upon any part of the agreement the minds of the contracting parties have not met, "the entire instrument is a nullity."

Not a Political Question.

Twenty-fourth. The Court of Appeals of the District of Columbia, in its opinion overruling the motion of appellants for a rehearing, said:

"The treaty of 1868 certainly did not vest in the Indians, either in their individual or tribal capacity, anything more than the right to occupy the lands as against the United States until it was found necessary to make other provision for them. There was no grant of estates either of freehold or leasehold; only a mere right to occupy and use the lands, according to the habits and customs of the Indians; but those rights of the Indians were secured to them as against every one, until Congress made provision for assuming control over the lands, and making other disposition thereof, upon such terms and conditions as Congress should prescribe.

"The contention of the complainants in this respect, as stated in the brief of their counsel, is this:

"Indians occupying lands in this country under provisions of treaties with the United States cannot be deprived of the use and occupancy of such lands without their consent except by due process of law; and such lands cannot be taken from them except in compliance with the treaty provisions under which such lands were acquired. The right of the Indians as to their occupancy is as sacred as that of the United States to the fee.

"We hold that it is not a judicial question of due process of law, to be determined by the courts, but that it is a political question for the determination by Congress; and Congress having acted with all the facts before it, including the memorial and protest of the Indians

against the Act of ratification, that Act of ratification is final and conclusive, and the courts have no power or jurisdiction over the subject.

"The case is of a nature that can be taken to the Supreme Court of the United States, and we shall be greatly gratified if that high tribunal may be able to find a way for affording a remedy for what is alleged to be a grievous wrong to the Indians. *Motion for re-argument overruled.*"

Twenty-fifth. The error of the Court of Appeals contained in the foregoing extract from its opinion is the logical sequence of the fundamental error contained in its first opinion, namely, that the Indian tribes, occupying lands in this country, "are subject to be changed from one locality or reservation to another, as may best serve the purposes and policy of the Government in the administration of Indian Affairs," and further, that: "They have no title in the lands they occupy, except in certain cases where treaties of settlement have conferred a title in the land; their right is simply to occupy, at the will of the Government and under its protection."

The exception above mentioned probably refers to lands allotted to Indians in severalty, under the provisions of various treaties, agreements and acts of Congress.

The Court of Appeals having erred in the historical statement, as clearly pointed out in this brief, its legal conclusion is equally erroneous.

Twenty-sixth. The opinion of the Court of Appeals of the District of Columbia in the case at bar, as set forth in the foregoing extract, is so contrary to the universally recognized principles of justice and equity that the Court itself, in announcing its judgment, evidently did so with a feeling of regret; for it concluded with the statement that the case could be taken to the Supreme Court of the

United States, and said: "We shall be greatly gratified if that high tribunal may be able to find a way for affording a remedy for what is alleged to be a grievous wrong to the Indians." Fortunately for Appellants in the case at bar this high tribunal has already found a remedy, for the wrongs inflicted upon Appellants, as will be seen from the authorities heretofore cited, and those to which the attention of the Court will hereafter be called.

SOMETHING WHICH SHOCKS THE CONSCIENCE.

Twenty-seventh. In the case of the New York Indians *v.* United States (170 U. S., page 23), Mr. Justice Brown, in delivering the opinion of the Court, said:

"*There is something, too, which shocks the conscience in the idea that a treaty can be put forth as embodying the terms of an arrangement with a foreign power or an Indian tribe, a material provision of which is unknown to one of the contracting parties, and is kept in the background to be used by the other only when the exigencies of a particular case may demand it. The proviso never appears to have been called to the attention of the tribes, who would naturally assume that the treaty, embodied in the Presidential proclamation, contained all the terms of the arrangement.*"

Twenty-eighth. In the New York case, from the opinion in which the foregoing extract is taken, the fact was disclosed that in making a treaty with the New York Indians, in 1840, the Senate amended it by adding a proviso, to the effect that such of the tribes as did not agree to remove to the country, set apart in Kansas for their new homes, within five years, should forfeit all interest in the lands so set apart to the United States. This proviso was passed by the Senate and thus became a part of the

treaty so far as that body was concerned, and the treaty is so printed in the volume entitled "Revision of Indian Treaties," page 550. But by some mistake, the proviso was not submitted to the Indians for their approval, with the other Senate amendments, and it was not proclaimed by the President as a part of the treaty. However, as the treaty was printed officially, the proviso appeared as a part of the text. The Indians did not occupy the lands within the five years, and the Government regarded them as forfeited and sold them. The Indians presented claims to the United States for the value of these lands. The claims were referred to the Court of Claims, under the Bowman Act for a finding of facts, and afterwards, a special Act was passed authorizing the Court of Claims to hear and determine these claims and to enter up judgment. Either party might appeal to this Court. The Court of Claims decided against the validity of the claims and the Indians appealed. This Court reversed the judgment of the Court of Claims, and remanded the case with instructions to enter a new judgment in favor of the Indians for the net amount actually received by the Government for the Kansas lands.

The extract above quoted from the opinion of this Court in the New York case is exactly in point in the case at bar. Congress amended the so-called Jerome Treaty and did not submit the amendments or the amended agreement to the Indians concerned, for their approval. The Indians objected to the original agreement and withdrew from it; and they were not even permitted to pass upon the amended agreement. As ratified by Congress it was unknown to the other contracting parties. The idea that such an Act can be put forth as embodying the terms of an arrangement with an Indian tribe shocks the conscience of every person who believes in justice and fair dealing.

THE INDIANS HAVE A VESTED RIGHT OF PROPERTY.

Twenty-ninth. The question as to whether the remedy for the taking of the Indian lands in question by the Act of Congress of June 6, 1900, is political or judicial depends upon the fact as to whether the Indians had a vested right of property in such lands.

Thirty. By the treaty of Medicine Lodge (Record, page 3) the land in question was "set apart for the absolute and undisturbed use and occupation of the Kiowa and Comanche tribes of Indians, and for such other friendly tribes or individual Indians as from time to time they (the said tribes) may be willing, with the consent of the United States, to admit among them; and the United States then solemnly agreed by the terms of said treaty that no person, except those therein authorized to do so, and except such officers, agents, and employés of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, should ever be permitted to pass over, settle upon, or reside in the territory described in said treaty." And by Article 12 of the treaty it was provided that no treaty for the cession of any portion or part of said reservation, which was to be held in common, should be of any validity or force as against said Indians, *unless executed and signed by at least three-fourths of all the adult male Indians occupying the same.*

Thirty-one. Counsel for appellants respectfully submit that this treaty creates a vested right of property in the lands mentioned therein. The use of property is property itself, within the meaning of the Constitution. (City of St. Louis *v.* Dorr, 41 S. W. Rep., page 1039.) Reference is also made to the numerous authori-

ties cited heretofore in this brief and wherein this Court frequently held that the right to the use of land was as sacred as the fee itself.

Thirty-two. A vested right is thus defined by Chancellor Kent:

"An estate is vested when there is an immediate right of present enjoyment or a present fixed right of future enjoyment." (4 Kent's Com. 202.)

A right is vested in a person when he has the power to do certain actions or to possess certain things according to the law of the land.

Chase, J., in Calder *v.* Bull, 3 Dall. U. S. 386.

Legislative Acts Impairing Vested Rights are Void.

An Act of the Legislature which seeks to divest or impair vested rights of property is generally held to be unconstitutional and void. (See 6 Am. and Eng. Encyc. of Law, Second Edition, p. 955, and numerous authorities therein cited, from the opinion of this Court in Calder *v.* Bull, *supra*, and opinions of supreme courts in twenty-three States of the Union, embracing eighty-six adjudicated cases, all supporting this proposition), and, we submit, there are no authorities to the contrary.

The Essence of Civil Liberty.

Thirty-three. On this point the special attention of the Court is called to the opinion of Chief Justice Marshall, in the case of Marbury *v.* Madison (1 Cranch 163). This opinion has become a classic in our jurisprudence, and has been cited with approval, perhaps, as often as any other opinion of the Supreme Court of the United States.

Chief Justice Marshall, delivering the opinion of the Court, said:

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the King, himself, is sued in the respectful form of a petition, and he never fails to comply with the judgment of his Court.

"In the 3d Vol. of his Commentaries (p. 23), Blackstone states two cases in which a remedy is afforded by mere operation of law.

"'In all other cases,' he says, 'it is a general and indisputable rule that where there is a legal right there is also a legal remedy by suit or action at law whenever that right is invaded.'"

"And afterwards (p. 109, of the same vol.), he says: 'I am next to consider such injuries as are cognizable by the courts of the common law. And herein I shall for the present only remark that all possible injuries whatsoever that did not fall within the exclusive cognizance of either the ecclesiastical, military or maritime tribunals are for that very reason, within the cognizanc of the common law courts of justice; for it is a settled and invariable principle in the laws of England that every right, when withheld, must have a remedy, and every injury its proper redress.'"

And further the Court held in the Marbury case:

"*The question whether a right has vested or not is, in its nature, judicial,*" *and must be tried by the judicial authority*" (page 167).

INDIAN TITLE A TENANCY FOR LIFE.

Thirty-four. In the case of United States *v.* Cook (19 Wall. 574), this Court, speaking through Chief Justice

Waite, who pronounced the unanimous opinion of the Court, after stating that the fee of Indian lands was in the United Sates, subject only to the right of occupancy, and that "the right of the Indians to their occupancy is as sacred as the United States to the fee;" "that the right of use and occupancy by the Indians is unlimited," and "that they may exercise it at their discretion;" and after further stating the legal questions involved in the case, said:

"These are familiar principles in this country and well settled, as applicable to tenants for life and remainder men. But a tenant for life has all the rights of occupancy in the lands of a remainder man. The Indians have the same rights in the lands of their reservations. What a tenant for life may do upon the lands of a remainder man the Indians may do upon their reservations, but no more."

Thirty-five. According to the opinion of the Court of Appeals in the case at bar, the Indians in this country are merely tenants at will; but according to the unanimous opinion of this Court they are tenants for life. This means life of the tribe, as the lands are not held in severalty; but by the tribe. A tenant at will occupies land at the pleasure of the owner of the fee; but a tenant for life has an estate of free hold. In Perry *v.* Allen, 3 Jur. N. S. 273, the Lord Chancellor said: Title by occupancy is a rightful title—an indefeasible title—just as much as a title by feoffment, fine, or recovery; the occupancy by occupation being *ipso facto* a tenancy *pur autre vie*, and as a freehold *pur autre vie*, is incapable of being defeated by any one." An indefeasible title is "that which cannot be defeated, undone, or made void." (Kinney's Law Dictionary, p. 383.) Such estates—estates for life—"were at common law, given or conferred by the same

feudal rites and solemnities, the same investiture, or livery of seizin, as fees themselves." 2 Black Com. 120; 4 Kent's Com. 24.

PERPETUAL RIGHT OF OCCUPANCY.

Thirty-six. In the case of The Leavenworth, Lawrence, and Galveston R.R. Co. *v.* United States (92 U. S.), this Court, speaking through Mr. Justice Davis, said:

"As long ago as the CHEROKEE NATION *v.* GEORGIA (5 Pet. 1), this Court said that the Indians are acknowledged to have the unquestionable right to the lands they occupy, until it shall be extinguished by a voluntary cession to the Government; and, recently, in United States *v.* Cook (19 Wall. 591), that right was declared to be as sacred as the title of the United States to the fee. Unless the Indians were deprived of the power of alienation, it is easy to see that they could not peaceably enjoy their possessions with a dominant race constantly pressing on their frontier. With the ultimate fee vested in the United States, coupled with the exclusive privilege of buying that right, the Indians were safe against intrusion, if the Government discharged its duty to them. This it has indicated a willingness to do; for in 1834 an act was passed (4 Stat. 729, Sec. 11) prohibiting, under heavy penalties, a settlement on the lands of an Indian tribe, or even an attempt to survey them. This perpetual right of occupancy, with the correlative obligation of the Government to enforce it, negatives the idea that Congress, even in the absence of any positive stipulation to protect the Osages, intended to grant their land to a railroad company, either absolutely or *cum onere*. For all practical purposes, they owned it; as the actual right of possession, the only thing they deemed of value, was secured to them by treaty, until they should elect to surrender it to the United States. In the free exercise of their choice, they might hold it forever; and whatever changed this condition, or interfered with it, violated the guaranties under

which they had lived. The United States has frequently bought the Indian title, to make room for civilized men—the pioneers of the wilderness—but it has never engaged in advance to do so, nor was constraint, in theory at least, placed upon the Indians to bring about their acts of cession."

Thirty-seven. In that case this Court held that the Indians in this country "are acknowledged to have the unquestionable right to the lands they occupy, until it shall be extinguished by voluntary cession to the Government," the doctrine of the sacred character of the title to their land, as laid down in United States *v.* Cook, *supra*, is affirmed, and it is distinctly stated that the Indians in the free exercise of their choice might hold it forever; and whatever changed this condition, or interfered with it, "violated the guaranties under which they had lived." Under this broad and comprehensive doctrine, the contention that Indians, occupying lands in this country, are mere tenants at the will of the Government of the United States, is utterly untenable. On the contrary, as this Court held in the Leavenworth R.R. case, *supra*, the Indians are tenants for life—the life of the tribe—and they thus have an estate of freehold as sacred and indefeasible as an estate in fee simple. This estate cannot be defeated, or taken from them without their consent.

POLITICAL RIGHTS NOT INVOLVED.

Thirty-eight. The case at bar does not involve the political rights of Appellants or of the other Indians in whose behalf this suit is brought. It involves their property rights only. All cases that may be cited by Counsel for Appellees as to the right of Congress to legislate in reference to the political rights of Indians, even

in disregard of treaty provisions, are inapplicable to the case at bar.

Due Process of Law.

Thirty-nine. Appellants cannot be deprived of their right to the use and occupancy of the lands in question without their consent, except by due process of law.

Appellants Have Not Consented to Sell Any of Their Lands.

Forty. By the demurrer in this case Appellees admit all the facts set forth in the Bill of Complaint. It is, therefore, an admitted fact in the case that Appellants have not consented to sell any of their lands to the United States, nor have they consented to the opening of any of their lands to settlement by white people. Their lands have not been taken by due process of law.

Due process of law implies, in all cases, a course of proceeding according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. It is imperative that there be a court of competent jurisdiction, a hearing, and a fair trial.

10 Am. and Eng. Encyc. of Law, 2d edition, 293, and numerous authorities therein cited.

Definition of Due Process of Law.

Forty-one. The question whether due process of law was accorded, or not, is judicial and not political, and the Courts will always entertain jurisdiction in such a case.

The following may be considered an exhaustive synopsis of the definitions given of due process of law:

"The words 'due process of law' in this place cannot mean less than a prosecution or suit instituted and conducted according to the prescribed forms and solemnities for the ascertaining guilt or determining the title to property. They mean, in each particular case, such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as these maxims prescribe for the class of cases to which the one in question belongs. As applied to judicial proceedings, they mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State or his voluntary appearance."

6 Am. and Eng. Encyc. of Law, 43, 1st ed.

PROPERTY CANNOT BE TAKEN WITHOUT JUST COMPENSATION.

Forty-two. The property of Appellants cannot be taken from them for public use without just compensation. And what is just compensation must in all cases be ascertained by a Court or a commission, and a notice and opportunity for hearing must be given to the persons whose property is to be taken.

This proposition is so elementary that it would be a waste of time to submit authorities in its support.

THE CONSTITUTION IS IN FORCE IN OKLOHOMA.

Forty-three. It was provided by section 28 of the act of Congress to organize a temporary government for the

Territory of Oklahoma, approved May 2, 1890, that the Constitution of the United States shall have the same force and effect in said Territory as elsewhere in the United States.

In the case of Downes *v.* Bidwell, one of the Porto Rican cases decided at the last term of this Court, it was held, among other things:

"That where the Constitution has been once formally extended by Congress to Territories, neither Congress nor the Territorial Legislature can enact laws inconsistent therewith."

182 United States Reps., page 271.

The Constitution provides that: "No person shall be" * * * "deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." (Amendments, Article 5.)

AN INDIAN IS A PERSON.

Forty-four. The Appellants are persons within the meaning of the foregoing provision.

In the case of the United States *v.* Crook, 5 Dill. (U. S.) 453, it was held that an Indian is a person within the meaning of the Habeas Corpus Act.

Professor Thayer, in the 1 Harvard Law Rev. 149, discussed the question whether a tribal Indian off his reservation and within a State is protected by the Fourteenth Amendment of the Constitution as being a person entitled to the equal protection of the laws. He says: "What then is there in the character of a tribal Indian to take him out from these clauses of the Constitution? He is a 'person' in the sense of being a human being, and why are we to give to the term on this part of the Constitution

any narrower meaning than that which includes all human beings."

10 Am. and Eng. Encyc. of Law, 440, 1st ed.

PROPERTY RIGHTS INVOLVED.

Forty-five. The right of occupancy of lands is a property right, a right which is as sacred as the fee itself, as all authorities conclusively establish.

The lands in question having been set apart by treaty with the United States, in consideration of the relinquishment by the Indians of the possession of large tracts of land in the State of Kansas and elsewhere, for the absolute and undisturbed use and occupation of the Appellants and the other Indians in whose behalf this suit is brought, and it having been stipulated in the said treaty of Medicine Lodge that no treaty for the session of any portion or part of the reservation should have any validity or force as against the said Indians, unless executed and signed by at least three-fourths of the adult male Indians occupying the same; and said Indians never having executed or signed such a treaty, and never having consented to the cession of any portion or part of their said lands, it follows that the Act of Congress of June 6, 1900, which pretended to ratify an agreement with said Indians, and to open two million acres of their said lands to settlement by white people, and to authorize certain persons to lay out counties and establish towns and sell town lots on said reservation, was enacted in violation of the property rights of said Indians, in violation of the treaty under which said lands were secured, and in violation of the provisions of the Fifth Amendment to the Constitution of the United States; and that said Act of Congress and all Acts amendatory thereof and supplementary thereto, are

null and void, and confer no powers, authority, or duties whatever upon Appellees in this case to carry the provisions thereof into effect.

APPELLANTS PROPERTY NOT TAKEN FOR PUBLIC USE.

Forty-Six. The taking of Appellant's property in the manner set forth in the Bill of Complaint was not, strictly speaking, a taking of private property for public use. It was rather the taking, by legislative decree, of property belonging to Indians and giving it to white men. The justification, which is urged for this legislation is, that the Indians are the wards of the nation, and that Congress may govern them and dispose of their property in any manner that its wisdom may suggest; and that whatever legislation Congress may enact in reference to Indians is political in its nature, and not subject to the jurisdiction of the Courts. If the relation of guardian and ward is to be recognized in our dealings with Indians, that relation does not go to the extent of permitting the guardian to appropriate to himself the ward's property, at his own discretion, or to take the property of the ward and give it to others.

Forty-seven. As heretofore stated in this brief the Medicine Lodge treaty is a contract. Congress having amended, in several important and material provisions, the alleged Jerome treaty after it was signed by the Indians, and neither the amendments nor the treaty as amended, having been submitted to the Indians for their approval, the minds of the contracting parties have never met in approval of said treaty. It was not the agreement of the Indians. The Act of Congress of June 6, 1900, which assumed to ratify an agreement with said Indians, could not give legal effect to a nonentity, or to that

which had no real existence. The said Act of Congress did not pretend to be other than an Act to ratify and confirm "said agreement." It was, therefore, a mere *brutum fulmen*.

Forty-eight. The alleged Jerome treaty is thus eliminated from the case. All that is left of the legislation is that which provides for the opening of the lands of the Indians to settlement by white people, the laying out of counties, townsites, the sale of town lots, and the putting of the mining laws in force, as provided in said Act. These provisions were not a part of the alleged treaty, but were enacted independently of it. This brings us again to the consideration of the question: "Can Congress deprive the Indians of the use and occupation of lands, secured by solemn treaty provisions, without their consent?" The authorities already cited in this brief conclusively answer this question in the negative.

Act Without a Precedent.

Forty-nine. Counsel for Appellants respectfully submit that Congress has never, prior to the passage of the said Act of June 6, 1900, passed an Act which deprived Indians of the right to the use and occupancy of lands secured to them by treaty, without their consent, except by due process of law. No such Act was cited in argument in the Court below by counsel for Appellees. Counsel for Appellants further submit, that no adjudicated case has been cited, which recognizes the right of Congress to deprive Indians of the use and occupancy of lands, thus secured by treaty or agreement, without the consent of the Indians, except by condemnation proceedings for rights of way for railroads. All the cases cited by counsel for Appellees in argument in the Court below

had reference to political rights only, with the exception referred to in paragraph Ninety-eight, *post q. v.*; and in none of them was there the slightest recognition of the newly discovered doctrine that the Indians in this country have no rights which Congress is bound to respect.

Indians Have Rights.

Fifty. The contention of counsel for appellees that Indians, being wards of the nation, Congress may deal with them as the States deal with minors, drunkards, idiots, and insane people, is wholly untenable.

By treating with Indians and by making agreements with them we have admitted their power to bind themselves and to impose obligations on us. As was said by Mr. Justice McLean, in the case of Worcester *v.* The State of Georgia (6 Peters, 581):

"We have made treaties with them; and are those treaties to be disregarded on our part because they were entered into with an uncivilized people? Does this lessen the obligation of such treaties?" Mr. Justice McLean answered his own questions as follows: "After a lapse of more than forty years [now more than one hundred years] since treaties have been solemnly ratified by the General Government, it is too late to deny their binding force." At the time this case was decided, as was stated by Mr. Justice McLean, "except by compact, we have not even claimed a right of way through the Indian lands." Chief Justice Marshall wrote the opinion in that case, and Mr. Justice McLean wrote a separate opinion, concurring therein and giving his reasons at length. A third of a century has elapsed since the Medicine Lodge Treaty was executed. The Indians have observed their part of the treaty, and they now invoke the aid of this Court to

protect their property rights under that solemn compact, from the unconstitutional encroachments of Congress and the Interior Department. The brief and argument of appellees ask, in effect, this honorable Court to regard the Medicine Lodge Treaty as "nothing more than idle pageantry," while appellants insist that it is now too late to deny its binding force. (Worcester *v.* Georgia, *supra.*)

But State laws do not divest minors and persons *non compos mentis* of the title to their real estate. Such laws confer upon the courts authority to hear and determine every case that may arise where the rights of such persons are involved, and if a necessity is found for the sale of their real estate the Court may order the sale of such portion of the estate as it may deem necessary for the support of such minors or incompetent persons. The sale is always the result of a judicial investigation and decree.

An Exception Not in Point.

Fifty-one. Counsel for Appellees state in their brief in the Court below (pages 48 and 49), that:

"The transaction in question here did not deprive the appellants of property or any property right such as is contemplated by said amendment [Fifth Amendment to the Constitution of the United States], but merely changed the form of such property, if property it be, and hence it does not fall within the inhibition of the amendment. But even though such occupancy be property or a property right within the meaning of said amendment, both the spirit and the letter of the amendment have been observed. Due process of law, according to the law of the land, does not in all cases mean a hearing before and a determination by a judicial tribunal. It is not always a judicial question for the courts to determine."

The contention above that the taking of private property by legislative decree does not conflict with the Fifth Amendment, if other property is given in exchange therefor, is wholly untenable. All taking of private property for public use is merely an exchange of property for money. If the contention is well taken, it will nullify all the safeguards of the Constitution for the protection of private property.

Fifty-two. Counsel for appellees contend further in the above extract that due process of law "does not in all cases mean a hearing before and a determination by a judicial tribunal." In support of this contention the case of Murray's Lessees *v.* Hoboken Company (18 Howard, 272) is cited. The attention of the Court to the opinion of the Supreme Court in that case is especially requested.

In that case the Collector of Customs of New York was found to be indebted to the United States for taxes collected by him and not paid over to the amount of $1,374,000, and a distress warrant was issued by the Solicitor of the Treasury, and his property seized and sold to satisfy the debt due the Government.

Fifty-three. There was no previous trial or hearing before a court in that case. The question in that case was whether that proceeding was due process of law within the meaning of our Constitution. The Court held that "these are cases under the law of England after *Magna Charta*, and as it was brought to this country and acted on here, in which process, in its nature final, issues against the body, lands and goods of certain public debtors without any such trial." (18 Howard, 280.) The Court cited the provision of the Constitution authorizing Congress "to lay and collect taxes, duties, imposts and excises," etc., and "to make all laws which may be necessary and proper for carrying into execution those powers."

Fifty-four. In the exercise of these powers the Court held: "Congress passed the Act of 1820, then in question, and provided a summary remedy to compel public officers to pay such balances of the public money as may be in their hands." "The power to collect and disburse revenue," the Court held, "and to make all laws which shall be necessary and proper for carrying that power into effect, includes all known and appropriate means of effectually collecting and disbursing that revenue, unless some such means should be forbidden in some other part of the Constitution." The reason for this exception to the general doctrine as to due process of law, was given by the Court as follows:

"It may be added, that probably there are few governments which do or can permit their claims for public taxes, either on the citizen or the officer employed for their collection or disbursement, to become subjects of judicial controversy, according to the course of the law of the land. Imperative necessity has forced a distinction between such claims and all others, which has sometimes been carried out by summary methods of proceeding, and sometimes by systems of fines and penalties, but always in some way observed and yielded to."

Fifty-five. Thus it appears that the case cited by Counsel for Appellees to sustain their contention, that due process of law "does not in all cases mean a hearing before and a determination by a judicial tribunal," does not apply to the case at bar, but, on the contrary, the Hoboken Company's case clearly shows that there is a distinction between the claims of the Government against public defaulters and all others. Appellants in the case at bar are not public defaulters, and their property has not been seized and sold for the payment of taxes due the Government. "Due process of law," as to "all others" than

defaulters of public revenue, means "a course of proceeding according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. It is imperative that there be a court of competent jurisdiction; that the proceedings be regular and appropriate to the question involved; and that the trial be a fair one." See 10 Am. and Eng. Encyc. of Law, pages 293 4, where the whole subject is most exhaustively treated.

Has Any Agreement Been Made?

Fifty-six. It is contended by counsel for appellees that the courts have no jurisdiction or authority to consider and determine whether a treaty or Act of Congress has been procured by fraud or duress. (Appellees' brief in the court below, page 18.) This point is conceded, but appellants insist that the courts have the power and authority to consider and determine whether any treaty was ever made, whether any agreement was ever executed, or whether any Act of Congress was ever passed, when property rights are involved. Appellants insist and conclusively show by their bill of complaint that no agreement was ever made by them, such as the alleged agreement which Congress assumed to ratify and confirm by the Act of June 6, 1900. They insist that that Act of Congress is unconstitutional and void, for the reason that it deprives them of two million acres of their lands without their consent, and without due process of law.

Unconstitutionality of Act.

Fifty-seven. But counsel for appellees insist that the unconstitutionality of an Act of Congress is not ground

for injunction against the executive department to prevent its execution. (Appellees' brief in Court below, page 51.) In support of this contention counsel for appellees cite the case of Mississippi *v.* Johnson (4 Wall. 475.) That was an application for an injunction to restrain President Johnson from enforcing the Reconstruction Acts of Congress. The Court held that the granting of an injunction in that case would interfere with the exercise of executive discretion.

But that is not the case at bar. There is no attempt in this case to interfere with executive discretion. The pending application is for an injunction to restrain certain officers of the Government from doing acts which are unlawful, and which acts will inflict irreparable injury upon the appellants in this case. The Act under which appellees assume to act is unconstitutional and void, and confers no authority, powers, or duties upon appellees whatever. An Act of Congress repugnant to the Constitution is not law. (Marbury *v.* Madison, 1 Cranch, 137.)

When Injunction Will Lie.

Fifty-eight. Where adequate compensation cannot be had at law, any person who will sustain injury by acts of an official may have an injunction to prevent such injury, and such officer cannot plead the authority of an unconstitutional law in justification of his acts. An unconstitutional law will be treated by the courts as null and void.

Board of Liquidation *et al. v.* McComb, 92 U. S. 541.

In the McComb case, this Court held as follows:

"But it has been well settled that when a plain official duty, requiring no exercise of discretion, is to be per-

formed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases the writs of mandamus and injunction are somewhat correlative to each other. In either case if the officer plead the authority of an unconstitutional law for the non-performance or violation of his duty, it will not prevent the issuing of the writ. An unconstitutional law will be treated by the courts as null and void."

Osborn *v.* Bank of the United States, 9 Wheaton, 859; Davis *v.* Grey, 16 Wall. 220.

A Government of Laws, Not of Men.

Fifty-nine. On this point the attention of the Court is again called to the decision of this Court in the case of Marbury *v.* Madison, *supra*. In that case, Chief Justice Marshall, delivering the opinion of the Court, said:

"The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy."

The Marbury case was against James Madison, then Secretary of State, and the high character of the office which he held was probably suggested in argument as a reason for immunity from legal process. But the learned jurist asked these pertinent questions:

"Is it on account of the character of the person against whom the complaint is made? Is it to be contended that the heads of departments are not amenable to the laws of their country."

The Chief Justice answered these questions as follows:

"Whatever the practice on particular occasions may be, the theory of this principle will certainly never be maintained. No act of the legislature confers so extraordinary a privilege, nor can it derive countenance from the doctrine of the common law."

The high officials of the Government "for whom the law," said the Court, quoting from Blackstone, "in matters of right, entertains no respect or delicacy," are just as amenable to the jurisdiction and orders of the courts as are the humblest individuals in the land.

What Official Acts are Political and what are Judicial.

Sixty. The line of demarkation between acts of executive officers, which are political or quasi judicial, and therefore not reviewable by the courts, and those acts and duties which are not political or quasi judicial, but which are subjects of judicial cognizance and control, was clearly drawn by Chief Justice Marshall in the Marbury case. The opinion in that case was handed down nearly one hundred years ago, and it has ever since received the unquestioned sanction of all the courts in the land. The acts of executive officers which were purely political or quasi judicial, were pointed out by the Court, and such acts, it was held, could never be examinable by the courts. Those acts which were not political and which were subject to judicial investigation and control, were stated as follows:

"But when the legislature proceeds to impose on that officer other duties, when he is directed peremptorily to perform certain acts, when the rights of individuals are

dependent on the performance of those acts, he is so far the officer of the law, is amenable to the laws for his conduct, and cannot at his discretion sport away the vested rights of others.

"The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the president, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy."

And further the Court held in that case—

"If one of the heads of departments commits any illegal act, under color of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law."

SOME NOTED CASES AGAINST EXECUTIVE OFFICERS.

Sixty-one. In the case of United States *v.* Amos Kendall, Postmaster-General (5 Cranch, C. C. Rep., pages 163 to 277), the United States Circuit Court of the District of Columbia issued a mandamus to compel the Postmaster-General to perform a ministerial act. This case was taken to the Supreme Court of the United States by writ of error and affirmed. (See 12 Peters, page 524.) This Court has on several occasions passed on this subject. (See 14 Peters, 497, 599.)

Sixty-two. A noted case, in which the Kendall case was followed and approved, is that of the United States *v.*

Carl Schurz, Secretary of the Interior (102 U. S. 378.) In that case a mandamus was asked to compel the Secretary to deliver a patent, which had been signed, sealed, countersigned, and duly recorded. The Supreme Court of the District of Columbia refused the writ, but on writ of error this Court reversed the judgment of the court below, and the case was remanded with instructions to issue the writ. (102 U. S., page 405.)

Sixty-three. In the case of Union River Logging Railroad *v.* Noble, Secretary of the Interior, *et al.*, the Supreme Court of the District of Columbia issued an injunction against the Secretary of the Interior and the Commissioner of the General Land Office, restraining them from executing a certain order which had been made by the predecessor of the Secretary. The case was appealed by Defendants to this Court, and the judgment of the Supreme Court of the District of Columbia was affirmed. (147 U. S. pp. 165–177.) This opinion was handed down in 1893, and was written by Mr. Justice Brown, all the Judges concurring. The opinion reviews all the adjudicated cases, including Marbury *v.* Madison, which is denominated "the great case," and Kendall *v.* Stokes, 12 Pet. 524, which is sometimes cited as the United States *v.* Kendall (see page 171), and held:

"We have no doubt the principle of these decisions applies to a case wherein it is contended that the Act of the head of a Department, under any view that could be taken of the facts that were laid before him, was *ultra vires*, and beyond the scope of his authority. If he has no power at all to do the act complained of, he is as much subject to an injunction as he would be to a mandamus if he refused to do an act which the law plainly required him to do."

The Court then quoted with approval the extract here-

tofore quoted from the opinion of this Court in the case of Board of Liquidation *v.* McComb, *supra*.

Sixty-four. In the case of Hoover *v.* McChesney (81 Fed. 472–485), the United States Circuit Court for Kentucky granted an injunction to restrain the postmaster at Lexington, Kentucky, from detaining, seizing, or tampering with mail matter addressed to the plaintiff. The postmaster was acting under orders from the Postmaster-General of the United States. The court held that the Postmaster-General's order was invalid and beyond his constitutional authority.

Sixty-five. In the case of Hoke Smith *v.* Reynolds (9 App. D. C. 216), the Court of Appeals of the District of Columbia held that—

"An injunction will lie to restrain the Secretary of the Interior and officers of the Land Department from attempting to exercise jurisdiction over land as a part of the public domain by directing a survey thereof or otherwise, where such land has been separated from the public domain by an act of Congress."

The opinion in that case was pronounced by Chief Justice Alvey. It reviewed the authorities and held that the proposed action on the part of the Land Department was purely *ultra vires*. "In such a case," this opinion stated, "it has been repeatedly held that an injunction may issue."

The case was appealed to this Court and the judgment reversed, on the authority of the decision in Warner Valley Stock Co. *v.* Smith (165 U. S. 31), which was to the effect that the suit abated on the resignation of the officer against whom the proceedings were instituted. There was no expression of opinion on the merits.

Sixty-six. In the case of Kirwan *v.* Murphy, in the

Circuit Court of Appeals, 8th Circuit, 49 U. S. App. 658, it was held that injunction would lie to enjoin officers of the several departments of the Government from the performance of ministerial acts under a wrong construction of law.

See also the following cases:

Dinsmore *v.* Southern Express Co., 92 Fed. Rep. 714, and cases therein cited.

Webster *v.* Douglas Co., 102 Wisc. 181; 71 N. W. 885.

The Minneapolis Brewing Co. *v.* McGillivay, 104 Fed. Rep. 258.

AN UNBROKEN LINE OF AUTHORITIES.

Sixty-seven. It will thus be seen by an unbroken line of authorities covering nearly one hundred years of our federal jurisprudence, it has been conclusively established that the heads of departments in Washington and other public officials may be compelled by mandamus to perform purely ministerial acts, and prevented by injunction from the performance of acts which are *ultra vires*, or which they have no lawful authority to perform.

THE MAKING OF TREATIES WITH INDIANS DISCONTINUED.

Sixty-eight. It is true, as stated in Appellee's brief in the court below, page 5, that in 1871 Congress determined to discontinue the policy of making treaties with Indians. (See Section 2079 of the Revised Statutes of the United States.) But it was expressly provided in that section that no obligation of any treaty lawfully made with an Indian tribe prior to March 3, 1871, should be invalidated or impaired thereby. And by Section 2116 of the Re-

vised Statutes, it was provided that no purchase, grant, or other conveyance of lands from any Indian nation or tribe of Indians should be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Since 1871, instead of executing treaties, which were made by the President and ratified by the Senate, as are treaties with foreign nations, agreements have been ratified and confirmed by acts of Congress. That is the only difference in the two methods of the Government. An agreement approved by the Indians and ratified by Congress has taken the place of a treaty which was made by the President and ratified by a two-thirds vote of the Senate.

The effect is precisely the same. The difference is only in the manner of ratification by the United States.

Indians May Sue in the Courts.

Sixty-nine. The right of Appellants to bring and maintain this suit in the courts has been questioned, by reason of the fact that they are Indians. And the further question has been raised as to whether they must sue as individuals or as a tribe, in the name of the tribe. Upon these questions, Appellants submit the following propositions:

Seventy. The law assumes that Indians may sue in the courts of the United States.

Section 2126 of the Revised Statutes of the United States is as follows:

"In all trials about the right to property in which an Indian may be a party on one side and a white person on the other, the burden of proof shall rest upon the white person whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

Seventy-one. An Indian tribe, not being a body politic or having a corporate name, cannot sue in the name of the tribe. But one or more members of the tribe, in behalf of themselves and the other Indians interested, may file a bill to protect their rights.

Strong *v.* Waterman, 11 Paige (N. Y.) Chancery Reports, 607.

16 Am. and Eng. Encyc. of Law, second edition, and numerous authorities therein cited.

Blue Jacket *v.* Commissioners of Johnson County (Kansas Indians), 5 Wall., 737.

Seneca Nation *v.* Christy, 162 U. S. 288–9.

The case of Strong *v.* Waterman, *supra*, is a conclusive authority on this point. The opinion was by Chancellor Walworth.

The following quotation from the statement of that case will show that the facts were similar to those in the case at bar.

"The bill was filed by the complainants, who were two chiefs of the Seneca nation of Indians, and who had been appointed by the general council of chiefs for that purpose, in behalf of themselves and the other individuals of the Seneca nation, residing on their several reservations. And the bill, after setting forth the original title of the Seneca nation of Indians to the lands of the reservations, not only by occupancy but also by the recognition of their rights by the State, alleged that the said nation of Indians and the people thereof residing on their reservations, had, under the law of the State of New York and the treaties with the United States, the sole and exclusive right to the possession, use, and occupancy of their reservations, until they should be voluntarily surrendered up or relinquished by the nation, in the manner provided by law. * * * Various other facts were stated in the bill, showing the necessity of the interference of the court of chancery, to

ascertain and settle the rights of the Indians to the lands claimed and possessed by the defendant, and to prevent the occupation of other portions of the reservation by him and the cutting of the wood and timber thereon. And the complainants prayed * * * that the defendant and his servants, agents, and workmen might be perpetually restrained by the injunction and decree of the court from entering upon, using, or in any manner interfering with, settling upon, or controlling the possession of any portion of the Cattaraugus reservation, or any improvements or fields thereon; and from cutting wood, timber, or saw logs on the premises, or carrying the same away, or committing waste, &c., and from hindering, molesting, or disturbing the Indians or individuals of the nation, in the possession of any of the lands of the reservation. And that the complainants, for themselves, and in behalf of the Seneca nation of Indians, might have such further or other relief in the premises as might be agreeable to equity."

Seventy-two. The following extracts from the opinion of the Court in that case are applicable to the case at bar:

"For the right to the possession is in several thousand individuals, in their collective capacity, which individuals, as a body, have no corporate name by which they can institute an ejectment suit. * * * The right of the Indians to the undisturbed possession and enjoyment of their lands being established, by the humane principles and policy of the State, if the common law furnishes no sufficient remedy for the protection of those rights, it is a part of the acknowledged jurisdiction of this Court to interpose for their relief. And I think, upon the case made by the complainant's bill, that this Court is bound to decree an account for the injury which the Indians have sustained by the trespasses upon their lands which have already taken place, and also to protect them by injunction, against the further threatened injuries from the defendant and those in his employ.

"The laws of this State do not recognize the different

tribes of Indians, within our bounds, as independent nations, but as citizens merely, owing allegiance to the State government, subject to its laws, and entitled to its protection as such citizens. (Jackson *v.* Goodell, 20 John. Rep. 188.) The Indians cannot, therefore, institute a suit in the name of the tribe; but they must sue in the same manner as other citizens would be required or authorized to sue, for the protection of similar rights. And as the individuals composing the Seneca nation of Indians, and residing on, and entitled to, their several reservations, are too numerous to join in this suit by name, the bill is properly filed by these complainants in behalf of themselves and the residue of the nation residing upon their reservations. The bill also shows that the two persons named as complainants have been duly authorized by the council of chiefs, who have the right to direct in all matters relating to the general interests and business of the nation. The parties are, therefore, properly before the court, and the complainants are entitled to retain this preliminary injunction."

Seventy-three. Appellants were authorized by a general council of the tribes held in the month of June, 1901, to institute any suit they might deem necessary for the purpose of preventing the wrongs and injuries against said Indians as set forth in their Bill of Complaint. (Record, pp. 20–1.) And in the 12th article of the Medicine Lodge treaty, by which treaty their right to the use and occupancy of these lands was secured, said Indians were treated, not as a body politic, but as individuals, who could alienate their lands only by a treaty "executed and signed by at least three-fourths of all the adult male Indians occupying the same." (Record, p. 4.) And said lands were "set apart for the absolute and undisturbed use and occupation of the Kiowa and Comanche tribes of Indians, and for such other friendly tribes or individual Indians as from time to time they (the said tribes) may be willing, with

the consent of the United States, to admit among them." (Record, p. 3.)

Seventy-four. In the Blue Jacket case, *supra*, the chief of the Shawnee tribe of Indians residing in Kansas, brought the suit as well for himself as all other members of the Shawnee tribe, and his right to sue in that manner was recognized and sustained by this Court in the case reported in 5th Wallace, 737. There were several other cases of like character reported in same volume, including the case of the New York Indians, in all of which the suits were brought as in the case at bar.

In the case of Seneca Nation *v.* Christie (162 U. S. 288–9), *supra*, the Strong *v.* Waterman case, *supra*, is cited and quoted with approval.

Upon this point Counsel for Appellants submit with perfect confidence that there are no adjudicated cases in this country in conflict with the doctrine laid down in the Strong *v.* Waterman case and the other cases above cited.

The Law of Estoppel.

Seventy-five. Counsel for Appellees state in their brief in the Court below (page 56), that Appellants have assented to the amended agreement by accepting its benefits, and are thereby estopped from saying it did not receive their approval. In previous pages of their elaborate brief and argument, counsel for Appellees have sought to show that Indians are the wards of the nation; that their condition is that of minors, lunatics, or persons *non compos mentis*, and that the Government occupies towards them the relation of *parens patriæ*. But, in this last contention, counsel for Appellees seek to bind them by the law of *estoppel in pais*, a legal consequence of one's acts which could only be imposed on those who are fully competent to manage their own affairs.

Seventy-six. But the facts do not support this last contention of Appellees. By reference to the Record, in this case (pages 23 and 24), there will be found the petition of the Appellants, other than Lone Wolf, to be made parties plaintiff in this suit, in which they state that they have never accepted allotments of their lands to the extent of approving said allotments. Other statements equally as important on this subject will be found in the Record, at the place indicated. But the Appellants are not especially opposing the allotment of a portion of their lands. They are contesting the confiscation of two million acres of their lands by legislative decree and the opening of those lands to settlement by white people. They seek, principally, to enjoin the Secretary of the Interior and all other officials of the Government from opening their lands to settlement by white people without their consent and in violation of property rights, secured to them by the solemn provisions of a treaty, which is the supreme law of the land. They seek to enjoin the Secretary and the other appellees from the performance of any acts in furtherance of this attempt to deprive them of their lands, from the surveying of them to the granting of patents to them to persons not members of their tribes.

Mr. Justice Bradley's Opinion.

Seventy-seven. This argument would be incomplete without special reference being made to the opinion in this case of Mr. Justice Bradley, of the Supreme Court of the District of Columbia, now deceased. That opinion is printed in the Record, pages 26 to 34. We will briefly refer to the most important of the cases cited in his opinion:

Seventy-eight. The case of Georgetown *v.* Alexandria Canal Co. *et al.* (12 Pet. 91), cited by Mr. Justice Brad-

ley to show that Appellants could not maintain this suit, is inapplicable. That case turned upon the question as to the right of private persons to abate a public nuisance. The Court, in the Georgetown case, held that such right did not exist, unless the Complainants alleged and proved special injury to them not suffered by the entire community. A public nuisance is a criminal offence, and the public prosecutor should abate it, unless private citizens suffer special injury. That was all that was determined in said case. It cannot be regarded as in any respect applicable to the case at bar.

The Indian tribes are not incorporated, have no corporate name and they are not a body politic. They can only sue in the manner adopted in this suit. This is fully established by the authority of the case of Strong *v.* Waterman, *supra*, and the other cases cited.

Seventy-nine. He quoted with approval the following from Denio, J., in People *v.* Smith, 21 N. Y. 595. "In imposing a tax or in appropriating the property of a citizen, or a class of citizens, for a public purpose, with a proper provision for compensation, the legislative act is itself due process of law."

In the case at bar the lands of the Indians were not taken on account of failure to pay a tax, or under the power of eminent domain. There is no pretence of that kind, and there was no "proper provision for compensation." In a "proper provision for compensation," "a hearing, or an opportunity to be heard, is absolutely essential." (Earl, J., in Stuart *v.* Palmer, 74 N. Y. 191, quoted by the Court below with approval (Record, p. 29). Both of the New York cases cited above sustain the contention of Appellants in this case.

Eighty. Mr. Justice Bradley (Record, p. 29) said:

"The proceeding adopted in this case is the ordinary course followed in many like cases where Indians of other tribes have agreed to accept lands in severalty, with compensation for lands taken by the Government and thrown open for settlement. It is the usual process. The method was first negotiation; then an agreement specifying terms subject to ratification by Congress; then full opportunity to be heard in Committees of Congress, and finally a legislative act providing for compensation."

With due respect, counsel for Appellants submit that the proceeding adopted in this case is not the ordinary course followed in like cases. It is not the usual process, unless the Court holds that the Indians have agreed to relinquish their rights to the lands in question, and are bound by the provisions of the so-called Jerome treaty. In all other cases, in dealing with the Indians in respect to the use and occupation of their lands, the Indians have agreed to relinquish their surplus lands, at a price fixed in the agreement, before any attempt has been made to deprive the Indians thereof. This is expressly provided for in the general allotment law. Section 5 of said law, entitled "an Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians and for other purposes," provides as follows:

"*And provided further*, That at any time after lands have been allotted to all the Indians of any tribe, as herein provided, or sooner, if in the opinion of the President it shall be for the best interest of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, *in conformity with the statute or treaty under which such reservation is held*, of such portions of its reservation not allotted as such tribe shall, from time to

time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress."

Eighty-one. The foregoing provision is a part of the "Land in Severalty Act," which was approved February 8, 1887, and it shows what the usual process is and what it has been ever since Congress adopted the policy of allotting to Indians their lands in severalty, and of purchasing their surplus lands to be opened to settlement by white people. This process has not been observed or followed in the case at bar. There has been no release of said lands by said tribes "*in conformity with the statute or treaty under which such reservation is held*," and the Indians have never consented to sell or relinquish the same.

Eighty-two. Mr. Justice Bradley held that the consent of the Indians in this case was not necessary. The following extract from his opinion (Record, p. 30) illustrates fully the position of the presiding justice:

"It is urged that inasmuch as the act of June 6, 1900, amended the agreement, and that such amendments were not submitted to the Indians and concurred in by them, there has not been such meeting of the minds of the contracting parties as to make a valid contract. If the validity of the legislation depended upon the concurrence of the Indians in its various provisions, the objection would have great force; but manifestly the existence of such a necessity would be an almost insuperable obstacle to all legislation in which their rights are concerned; it would be inconsistent with the relation that they occupy to the Government, and in direct conflict with that sovereignty that the United States of necessity, of right, and in fact

exercises over them. They are not independent nations. They are dependent 'wards' of this nation 'in a state of pupilage,' subject to the control of Congress."

Eighty-three. In support of this doctrine Mr. Justice Bradley quoted from Mr. Justice Miller, in the case of U. S. *v.* Kagama (118 U. S. 375). But in that case the only question involved was as to the power of Congress to subject the Indians to laws which provided that offences committed by one Indian against another should be tried in United States Courts, instead of tribal Courts. That was the only question involved, and it was the power of Congress to so provide, which was sustained in that case.

Eighty-four. So in the case of Cherokee Tobacco (11 Wall. 616). It was held in that case that the internal revenue laws applied to the Cherokee nation. The internal revenue laws did conflict with the treaty with the Cherokee nation. But the conflict had reference only to political questions. It did not involve the power of Congress to deprive the Indians of their land. The quotation, in his opinion, from the case of Foster *v.* Neilson (2 Pet. 314), had reference to political rights only. It is true that "a treaty may supersede a prior act of Congress and an act of Congress may supersede a treaty." But an act of Congress, under which property rights have been secured, cannot divest those rights by a repeal of the prior act. And so of rights secured by a treaty. They stand precisely upon the same plane as rights secured by acts of Congress. The distinction between political and property rights is well defined, and there is no conflict in the authorities on the subject. The failure to observe this distinction accounts for the error into which the Courts below have fallen.

Eighty-five. The case of the Cherokee Nation *v.* Kansas

Rwy. Co. (135 U. S. 641), was cited by Mr. Justice Bradley. In that case the Court held that Congress had the power to exercise the right of eminent domain in the Cherokee nation. But Mr. Justice Bradley failed to point out the fact that in that case there was the most ample provision made by the Act of Congress for ascertaining the value of the improvements upon the lands taken for the right of way and for payment to the nation for the value of the land itself; and in both respects a judicial hearing was provided for as in condemnation proceedings generally. That case is in no respects similar to the case at bar.

Eighty-six. The Old Settler's case (148 U. S. 427) was also cited by Mr. Justice Bradley. In that case this Court stated that—

"The Court of Claims declined to go behind this treaty on the ground that it was not within the province of a Court, either of law or equity, to determine that a treaty or an act of Congress had been procured by duress or fraud, or to declare it inoperative for that reason, and that it was not the purpose of the act to confer upon that Court extra judicial powers."

Eighty-seven. The treaty in that case was executed in 1846. Fifty-four years had elapsed before the courts were asked to set the treaty aside upon the ground that it had been procured by duress and fraud. Quite different is the case with the alleged Jerome treaty. The Indians began their repudiation of the treaty as soon as it was signed, and continued to protest against it from 1892 until October, 1899, eight months before Congress pretended to ratify it, when they in general council of substantially all the adult male members repudiated it and petitioned Congress to cast it out and not accept it

as their free act and deed. But this is not the whole truth. In assuming to ratify the alleged Jerome treaty Congress amended it in several material respects, and did not submit the amendments or the amended treaty to the Indians for their approval. Hence the minds of the contracting parties never met and no agreement was ever made. There is a marked difference between determining whether a treaty or an act of Congress was procured by duress and fraud; or whether any treaty or act whatever was executed or enacted. The courts will always ascertain, where property rights are involved, and an act of legislation is called in question, whether the act were really passed or not, as required by the Constitution of the State or the Nation.

Eighty-eight. The last case cited by Mr. Justice Bradley is that of The United States *v.* Choctaw Nation *et. al.* (179 U. S. 494; Record, p. 33.) In that case it was alleged that the compensation to be paid the Indians by the terms of the treaty of 1866 was inadequate, and that the Indians evidently did not understand its provisions when they executed it. But this Court, in a very able opinion by Mr. Justice Harlan, held that the Court could not give the treaty a construction inconsistent with the clear import of the words of the treaty itself. Notwithstanding the alleged inadequacy of compensation for the lands which were ceded to the United States by the treaty, this Court decided that the Indians were held and firmly bound by its provisions. The Indians admitted that they had made and executed it, and this Court very properly held that it was binding upon them. "It is a poor rule that won't work both ways." If the Choctaw treaty of 1866 was binding upon the Indians, why is not the Medicine Lodge treaty of 1868 binding upon the United States? This question is answered in the case of Worcester *v.* the State

of Georgia (6 Pet. 581), to which reference has already been made. In that case Mr. Justice McLean, concurring with the opinion of the Court, said:

"We have made treaties with them, and are those treaties to be disregarded on our part, because they were entered into with an uncivilized people? Does this lessen the obligation of such treaties? By entering into them, have we not admitted the power of this people to bind themselves and to impose obligations on us? * * * Nations may differ from each other in condition, and that of the same nation may change by the revolution of time, but the principles of justice are the same. They rest upon a base which will remain beyond the endurance of time."

APPELLEES' AUTHORITIES.

Eighty-nine. In the brief of Appellees filed in the Supreme Court of the District of Columbia, to which reference has heretofore been made, numerous authorities were cited to sustain their contentions. Some of the cases cited have heretofore been mentioned, and their inapplicability to the case at bar has already been pointed out. Lest our silence should be misconstrued, other cases cited in Appellees' brief will be referred to, and their utter failure to sustain Appellees' contentions will be pointed out.

Ninety. The Kagama case (118 U. S. 375) has already been mentioned. The quotation from the opinion of this Court in that case, printed in Appellees' brief, page 9, not only does not sustain Appellees' contentions, but it fully sustains the contentions of Appellants. This Court, in that case, referring to the Indians in this country, said:

"From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government

with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and *by this Court, whenever the question has arisen.*"

In the case at bar, Appellants now confidently ask that this Honorable Court will interfere in their behalf and protect them from the confiscation of their lands, the permanent occupancy of which was solemnly promised them in the Medicine Lodge Treaty of 1868. Heretofore similar protection has always been afforded by this Court; "whenever the question has arisen."

Ninety-one. On page 11 of Appellees' brief, is a quotation from a message of the late President McKinley, which fully illustrates his own kindly disposition and keen sense of justice. He said the Indians were the wards of the Nation, but that "they should, nevertheless, be dealt with in a manner calculated to give them confidence in the Government and to assist them in passing through the inevitable transition to a state of civilization and full citizenship." Will the taking of two million acres of the lands of Appellants, the perpetual occupancy of which has been solemnly promised by the Government, be calculated to give the Indians "confidence in the Government?" This Court must answer that question. In the opinion of counsel for Appellants nothing could inspire the confidence of the Indians so much as a full recognition by this Court of the absolute right of Appellants in this case to the occupancy of their lands, until voluntarily relinquished by them, and a decree of this Court securing to them this right.

Ninety-two. In Appellee's brief, pages 12 and 13, is a quotation from the opinion of this Court in the case of the *Amiable Isabella* (6 Wheat. 1, 71, 72) in which it is

stated that the treaty-making power is political and belongs to Congress and the Executive and not to the Courts. This is conceded. The power to make, alter or amend by inserting any clause, whether small or great, important or trivial, belongs exclusively to Congress and the Executive. But the power to construe and enforce treaties is distinctly recognized as judicial, as stated in that opinion; and "*this Court*," it was held, "*is bound to give effect to the stipulations of the treaty in the manner and to the extent which the parties have declared, and not otherwise.*" In this opinion it is distinctly and forcibly stated that the construing and enforcement of treaties is a judicial question, and that it is the duty of the courts "to give effect to the stipulations of the treaty." The sole object of the institution of the case at bar and in bringing it to this Court on appeal is to secure a judicial decree giving effect to the stipulations of the treaty of 1868. Congress and the Executive Department of the Government have utterly disregarded those stipulations. The Appellants have never made any treaty since that of Medicine Lodge in 1868. Congress attempted to make an agreement for them by the Act of June 6, 1900. But there were no contracting parties. The Indians never agreed to the Act, nor were they asked to agree to it. Congress alone participated in making the so-called agreement.

The opinion of this Court in the case of the *Amiable Isabella*, *supra*, fully sustains every contention of Appellants in the case at bar, and completely overwhelms the contentions of Appellees.

Ninety-three. The case of Doe *v.* Braden (16 How. 635) is cited by Appellees (brief, page 14) in order to make it appear that the question of enforcing a treaty is political and not judicial. But the case does not support the contention of Appellees. The question which this Court

declared to be political, in that case, was whether the treaty-making power in Spain was lodged in the King or in the Cortez. This Court very properly refused to open that question. It was one solely for the political departments of the Governments to determine. That case is inapplicable to the case at bar.

Ninety-four. Counsel for Appellees in their brief (page 17) cite the case of Fellows *v.* Blacksmith (19 How. 366). But that case is inapplicable to the case at bar. In that case an objection was taken in the argument to the validity of the treaty on the ground that one of the bands of Indians who executed it was not represented by the Chiefs and headmen of the bands in the negotiations and execution of it. This Court answered that objection by stating that the treaty, after being executed and ratified by the proper authorities of the Government, became the Supreme law of the land, "and the courts can no more go behind it for the purpose of annulling its effect than they can go behind an Act of Congress." That case was an action of trespass, *quare clausum fregit*, brought by one John Blacksmith, a Seneca Indian, against Fellows and Kendle, for entering with force into the close of the plaintiff. Defendants claimed title under an Indian treaty.

There were two treaties executed by and between the United States and the Indians, who consisted of nine bands or tribes, one of whom was the Tonawanda band. The two treaties were executed in 1838 and 1842, respectively. The trespass suit was decided by this Court in 1856, which was fourteen years after the execution of the treaty of 1842. It is not stated in the report or opinion of the case to which of the treaties the objection in argument was made. The opinion of the Court gives a synopsis of the evidence submitted on the trial of the case in

the lower court, but no reference is made to any evidence in reference to the failure of the chiefs and headmen of one of the bands to execute the treaty. Hence the objection taken in the argument must have appeared, if at all, on the face of the papers. The question raised in argument, which the Court decided in that case, was to the effect that it was for the United States to determine the authority of the Indians who may execute a treaty with the Government. There were nine tribes who participated in the formation of the treaties involved in that case. There was no question raised by any of the tribes as to the proper execution of the treaty. After the last executed of the two treaties involved had been in existence fourteen years without challenge by any one as to their validity, and without any objection to it ever having been raised by the Indian tribe which, it was alleged, did not properly execute it, this Court very properly held that the Defendants in that trespass case could not take advantage of such an objection. The treaty had been executed by the Indians, whom the Government recognized as competent to enter into the negotiations, and it had been acquiesced in, and was then acquiesced in by all the Indians concerned. There is no similarity in that case to the case at bar.

Congress alone made the so-called agreement, which is set forth in the act of Congress, of June 6, 1900. The agreement as amended was not submitted to the Indians for their approval. They never have approved it, and it is unreasonable to contend that they are bound by its provisions. It may be added, that this Court, in the case of Blacksmith *v.* Fellowes, gave effect to the treaty as executed, and recognized the right of the plaintiff, who was an Indian, to sue in the courts, and fully sustained his property rights under the treaties of 1838 and 1842.

Ninety-five. Counsel for Appellees, in their brief, page 23, state that Appellants' contentions that they have not ceded the land in question, may be dismissed with the statement that the decision of the political branch of the Government that their lands have been properly ceded is conclusive. This contention, if conceded, would deny to the courts the right to construe treaties and Acts of Congress, and would invest the heads of the departments with absolute power. On the contrary, as was held in the case of the *Amiable Isabella, supra*, it is the province of the courts to construe treaties, to find out the intention of the parties to them; and "this Court is bound to give effect to the stipulations of the treaty in the manner and to the extent which the parties have declared, and not otherwise."

Ninety-six. Counsel for Appellees, in their brief, pages 23 and 24, place great stress upon the assertion that, "An Act of Congress may supersede a treaty." It is conceded that Congress may abrogate treaties and repeal prior acts. But it has never been seriously contended that such abrogation or repeal affected the validity of titles acquired under the treaties or laws while they were in force. The United States recently concluded a treaty with Spain by which Porto Rico and the Philippine Islands were ceded to the United States. Suppose Spain or the United States should abrogate that treaty, would that invalidate the cession of those Islands to the United States? Or, suppose Congress should repeal the homestead laws of the United States, would such repeal in any manner, or to any extent impair the titles to the millions of acres of land acquired for homesteads while those laws were in force? Unless these questions can be answered in the affirmative, the contention of counsel for Appellees proves too much. But as applied to the case at bar, it requires an affirma-

tive answer to support the contention of counsel for Appellees, that an Act of Congress may supersede, a prior treaty, and invalidate property rights acquired under it.

Ninety-seven. The case of Ward *v.* Race Horse (163 U. S. 504) was cited by counsel for Appellees (Brief, page 25), in order to support the doctrine contended for in the previous paragraph. But that case involved only the right to hunt game upon unoccupied public lands, which was a mere privilege, which carried with it no right whatever to the land. And in the case of Thomas *v.* Gay (169 U. S. 264) cited on page 25 of Appellees' brief, the question involved was purely political. The exemption from taxation and the inclusion of land within the limits of any State or Territory involve questions of public policy and not property rights.

Ninety-eight. Counsel for Appellees in their brief (pages 26, 27, and 28), refer to the recent Acts of Congress in reference to the Five Civilized Tribes and attach special importance to the Act of Congress of June 28, 1898, known as the Curtis Act. In Appellees' brief (page 27) there is the following statement:

"The act of 1898 provided that upon completion of the rolls of any tribe a commission should proceed to allot the exclusive use and occupancy of all the lands of such tribe among the citizens thereof, such allotments to be confirmed by the Secretary of the Interior; that the minerals in their lands should be leased by the Secretary of the Interior, who was given authority to fix the rate of all royalties to be paid by lessees; that town sites should be surveyed, laid out and platted and the lots therein appraised and sold under the supervision of the Secretary of the Interior."

In the foregoing extract reference is made to sections 11, 13, and 15 of the Act of Congress of June 28, 1898 (30 U. S. Stats., pp. 497–498–500).

Counsel for Appellees certainly did not intend in making the foregoing statement to mislead the Court. But the statement is incomplete and misleading. The phrase, "that the Commission (meaning the Dawes Commission) should proceed to allot the exclusive use and occupancy of all the lands of such tribe among the citizens thereof" is not correctly quoted. The language of the Act (section 11, page 497 of said Statutes) is as follows: "Shall proceed to allot the exclusive use and occupany *of the surface* of all the lands of said Nation or tribe." The title to the land still remained in the tribe, and the citizen of the tribe got no better title than he had before. The Act was an effort on the part of Congress to prevent the monopoly of the land by a few persons and to equalize the land-holdings so as to give every citizen an equal share in the use of the lands of the tribe. The title to the land was not affected. The section in reference to leasing tribal lands (section 13, page 498) is vague and uncertain in its meaning. And there is a suit now pending in this Court, the Cherokee Nation *v.* Ethan A. Hitchcock, No. 340, which involves the construction and constitutionality of that section.

The town-site reference in the foregoing extract is incomplete and misleading. By reference to section 15 of said Act (pages 500-501) it will be seen that no titles passed to the purchasers of town lots; that the purchase-money was to be deposited in the U. S. subtreasury at St. Louis, and "such deposit shall be deemed a tender to the tribe of the purchase-money for such lot." Deeds could only be obtained from "the person authorized by the tribe." Unless the tribe should authorize some person to execute deeds to the lots no title would pass to the purchaser. This was a distinct recognition by Congress of the doctrine that the tribe could not be divested of the

title to its lands without its consent. Notwithstanding these plain and unmistakable provisions of the Act of June 28, 1898, counsel for Appellees in the extract above quoted from their brief, cite this Act as a legislative precedent for the Act of June 6, 1900, the Act in question in the case at bar, which divested the Kiowa, Comanche and Apache tribes of the title to two million acres of their lands without their consent.

The Act of June 28, 1898, has been regarded by all persons familiar with conditions in the Indian Territory as coercive in its nature and as intended to constrain the Five Civilized Tribes to enter into agreements with the United States for allotment of their lands, the granting of titles to lots in towns and cities, and for the ultimate relinquishment of their tribal governments. It has certainly had that effect. Since the passage of that Act all of the Five Civilized Tribes have entered into agreements with the United States covering the points indicated. Hence the sections of said Act of June 28, 1898, to which reference has been made, have all been repealed, or have become inoperative by reason of agreements between the United States and the tribes respectively—all of which agreements were submitted to the tribes interested for ratification or rejection. Hence whatever may have been the legislative precedent, in support of the contentions of Appellees in the case at bar, which were established by the Act of June 28, 1898, such precedent was of short duration and of no benefit to Appellees.

Ninety-nine. Reference is made in Appellees' brief, page 28, to the case of Stephens *v.* Cherokee Nation (174 U. S. 445), and the opinion of this Court in that case is cited in support of their contentions in the case at bar. In that case this Court held that the legislation of Congress which the case involved was constitutional. The

only question really involved was in reference to ascertaining who were citizens of the tribe and entitled to a participation in the distribution of the lands and other property of the tribes.

As that case was so recently decided by this Court, after exhaustive argument of counsel, it is unnecessary to take up the time of the Court in this argument with a statement of the questions involved. It is sufficient to state that they were of a political character, and this Court very properly held "the entire legislation constitutional," —having reference to the legislation involved in that case. But when questions affecting the titles to the lands in the Indian Territory arose, Congress proceeded to secure the consent of the Indian tribes in every instance as has been the policy of the Government from time immemorial. Agreements have recently been made with the Five Civilized Tribes as follows :

Choctaws and Chickasaws, by Act of Congress approved June 28, 1898. 30 U. S. Stats., p. 505.

Creeks or Muskogees, by Act approved June 28, 1898. 30 U. S. Stats., p. 514.

Seminoles, by Act of Congress approved July 1, 1898. 30 U. S. Stats., p. 567.

Cherokees, by Act of Congress approved March 1, 1901. 31 U. S. Stats., p. 848.

Creeks or Muskogees, by Act of Congress approved March 1, 1901. 31 U. S. Stats., p. 861.

Cherokees, by Act of Congress approved July 1, 1902. U. S. Session Laws, 1st Session, 57th Congress, p. 716.

Creeks or Muskogees, by Act of Congress approved June 30, 1902. U. S. Session Laws, 1st Session, 57th Congress, p. 500.

Choctaws and Chickasaws, by Act of Congress approved July 1, 1902. U. S. Session Laws, 1st Session, 67th Congress, p. 641.

In all of the foregoing agreements there were provisions submitting them to the Indians concerned for ratification or rejection. In no instance was the agreement to take effect until ratified by the Indians.

The agreement with the Creek, which was ratified by Act of Congress of June 28, 1898, and that with the Cherokees, which was ratified by the Act of Congress of March 1, 1901, were both rejected by the tribes at popular elections, and Congress afterwards amended them, and resubmitted them to the tribes respectively, so as to meet the wishes of the Indians, and the amended agreements were then ratified by the Indians. It has always been the policy of Congress, in dealing with Indian tribes in respect to their lands or in respect to the lands which they occupy, to submit all treaties or agreements and all amendments thereto, to the Indians interested for their ratification or rejection. There is but one exception to this course and that is found in the Act of Congress of June 6, 1900, in question in this case. (See paragraphs of this brief First to Ninth, inclusive.)

One Hundred. The Secretary of the Interior, who is the first named Respondent in the case at bar, addressed an official letter to the Speaker of the House of Representatives on the 15th day of April, 1902 (H. R. Doc. 552, 1st Sess. 57th Congress), in which he transmitted a Memorial of the National Council of the Cherokee Nation, which submitted a form of bill for the allotment of the lands of the tribe, the disposition of town-sites and for other purposes. The Secretary stated that he considered many of the provisions contained in the memorial were "inexpedient and impracticable," and that he had therefore caused to be prepared a draft of legislation, being "a Bill to allot the lands of the Cherokee tribe of Indians in Indian Territory, and for other purposes," which was, the

Secretary stated, in his judgment, "preferable to the memorial above referred to." The Secretary's draft of the Bill, which he transmitted to Congress, and the passage of which he recommended, did not contain any provision for its submission to the Cherokee Indians for their ratification or rejection. He called attention to the fact that the Cherokee agreement, which Congress ratified by Act approved March 1, 1901 (31 U. S. Stats. 848), and submitted to the Cherokees for their ratification or rejection, had been "rejected at an election held on April 29, 1901, the majority against the agreement being 1,023 out of a total of 5,569 votes cast at the election." He then added this very important statement:

"In view of the action of the Nation in rejecting said agreement, no provision has been placed in said Bill for its submission to the legal voters of the Nation for rejection or ratification."

There is no mistaking the meaning of this proposition. At the time this proposed bill was transmitted to Congress by the Secretary of the Interior, the principal respondent herein, the case at bar was pending in this court on appeal from the Court of Appeals of the District of Columbia. A legislative precedent which the passage of the Secretary's Bill would establish, to the effect that Congress had the right to dispose of Indian lands in any manner deemed, by the law makers, advisable, without the consent of the Indians concerned, would doubtless have been cited and relied upon in argument by counsel for Appellees to sustain their contentions in this case. But Congress disregarded the suggestion of the Secretary and passed a Bill differing materially in its provisions, and added a section as follows:

"SEC. 74. This Act shall not take effect or be of any validity until ratified by a majority of the whole number of votes cast by the legal voters of the Cherokee Nation in the manner following:"

Then followed a section prescribing the manner of submission, in pursuance of a proclamation by the Principal Chief, at an election to be held by Cherokee officials, under Cherokee laws—the votes to be canvassed by the Cherokee National Council, in the presence of a member of the Dawes Commission; and said member and the Principal Chief were to make proclamation and issue a joint certificate as to the result of the election, which was to be transmitted to the President of the United States. The Act was ratified at an election held in August last, and the Bill, as passed by Congress and as ratified by the Cherokee Indians is now a law, entitled: "An Act *to provide for* the allotment of the lands of the Cherokee Nation, for the disposition of town sites therein and for other purposes," passed by Congress, July 1, 1902. (See U. S. Session Laws, 1st session, 57th Congress, page 716.) Not only was this Act submitted to the Indians concerned for their ratification or rejection, but it contained a section (Sec. 73, page 727 of said laws) declaring that the provisions of section 13 of the Act of Congress, approved June 28, 1898 (cited by counsel for Appellees as a legislative precedent, in their brief, page 27, to sustain their contentions in the case at bar,) "shall *not* apply to or in any manner affect the lands or other property of said tribe." Such are the legislative precedents on this subject. The only legislative precedent, therefore, as stated heretofore, which sustains Appellees' contentions, is found in the Act of June 6, 1900, the validity of which is called in question by the case at bar.

One Hundred and One. There is some doubt even as to whether Congress really intended to ratify the so-called Jerome Agreement with the Kiowa, Comanche and Apache Indians. The Act of ratification is entitled: "An Act to ratify an agreement with the Indians of the Fort Hall Indian Reservation in Idaho, and making appropriations for carrying the same into effect." (See 31 U. S. Stats., page 672.) The title of the Act was misleading and imperfect. The Fort Hall agreement which was ratified had theretofore been ratified by the Indians concerned, and that part of the Act did not require submission to the Indians. The so-called Jerome Agreement was inserted in said Act as section 6 by amendment. The fact that it was being amended and ratified without submission to the Indians for ratification or rejection does not appear to have been called to the attention of either House of Congress. It is highly probable, therefore, that but few Senators or members understood the full import of the measure. The subsequent course of Congress in submitting all legislative provisions affecting titles to Indian lands to the ratification or rejection of the Indian tribes concerned, supports the inference that the Act of June 6, 1900, in so far as it provided for amending and ratifying an agreement with the Kiowa, Comanche and Apache Indians, was, to put it mildly, inadvertently passed, or at least passed without a full understanding of its provisions.

Further reference to the authorities cited in Appellees' brief is deemed unnecessary.

In Conclusion.

Counsel for Appellants submit this case to this Honorable Court upon the facts set forth in the Bill of Com-

plaint, which are admitted by the demurrer, and upon the authorities cited in this argument, which are not in conflict with any other authorities not cited, with perfect confidence that the judgment and decree of the Court below sustaining the demurrer should be reversed, and the cause remanded with direction to enter a peremptory order for an injunction to prevent the Appellees from proceeding further in the premises, and a decree in full accordance with the prayer of the Bill; and directing the Court below to grant to Appellants such other and further relief as equity and the nature of the case may require.

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